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IN THE

Supreme Court of the United States

October Term, 1959.
No. 926

HARTLEY PEN COMPANY,

Petitioner,

vs.

FORMULABS, INC., and E. I. DU PONT DE NEMOURS & COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No. .....

HARTLEY PEN COMPANY,

Petitioner,

vs.

FORMULABS, INC., and E. I. DU PONT DE NEMOURS & COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Hartley Pen Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled appeal on February 15, 1960.

OPINIONS BELOW.

The District Court did not write an opinion.

The opinion of the Court of Appeals (*infra*, Appendix A; pp. 1-9) is reported in 275 F. 2d 52.

JURISDICTION.

The judgment of the Court of Appeals (*infra*, Appendix B, p. 10) was dated and entered on February 15, 1960.

Petitioner's petition for rehearing was duly filed on March 16, 1960 and denied on April 8, 1960 (*infra*, Appendix C, p. 11).

There has been no order granting an extension of time within which to petition for certiorari; none has been requested.

The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254(1).

QUESTIONS PRESENTED.

The questions presented cannot be adequately epitomized because of the multiple phases thereof, the many proceedings and voluminous record involved and the unprecedented manner in which intervention was obtained in this case.

Most of the questions are of first impression and all are of peculiar gravity and general importance.

The questions more adequately appear throughout this petition and particularly in the Reasons for Granting the Writ.

However, as an index thereto, petitioner submits the following:

1. Whether in petitioner's action for breach of warranty against du Pont, arising out of its sale to petitioner of defective dyes, which petitioner used in its manufacture of ball point pen inks, which resulted in most extensive damages to petitioner, in which action du Pont traversed most of the material allegations of petitioner's complaint and alleged several affirmative defenses, and in which thereafter the District Court, during discovery proceedings, made, over petitioner's militant objections, disclosure orders requiring petitioner (on the threat of dismissal

of its action) to disclose to du Pont secret formulas and a test (none of which were the subject matter of the said action or in issue therein, or the title or possession to which were not involved therein and which would not be affected at all by the judgment in said action), Formulabs (which had licensed one formula to petitioner under the condition that it would not *voluntarily* disclose and would use *reasonable precautions* against *involuntary* disclosure) could intervene, as a matter of right, under F. R. C. P. Rule 24(a)(3), by its cross-complaint, which did not seek to join or aid petitioner, did not attack or seek to set aside or in any way affect the disclosure orders (which, on the contrary, Formulabs contended the District Court could make) but *sought the same District Court to enjoin petitioner from obeying the District Court's said disclosure order.*

2. Whether such a cross-complaint by Formulabs, which the District Court epitomized as follows [Tr. 288] (it made this statement to Formulabs' attorney): "The next step after you had permission to intervene was then to get this court to enjoin one of the parties to the action from doing what I told him he had to do or the action would be dismissed," states any cause of action or a claim for intervention, as of right, under Rule 24(a)(3).

3. Whether, as petitioner contends, Rule 24 is an integral rule and Rule 24(c), which requires a party seeking to intervene to state a *good* claim "for which intervention is sought" applies to all the subdivisions of Rule 24, including 24(a)(3). The Court of Appeals held that 24(c) was not involved. This is a question of first impression and petitioner's research has indicated it has not been decided by this Court or any other Courts of Appeals.

4. Whether, as petitioner contends, in order to intervene under Rule 24(a)(3) the applicant must be so situated as to be adversely affected by a disposition or distribution of property in the custody or subject to the control or disposition of the court and that the intervenor must have such an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment. The Court of Appeals held to the contrary, particularly that the intervenor need not have such an interest in the subject matter of the litigation, need not gain or lose by the direct legal operation of the judgment, and in fact that a judgment need not be involved at all but that an order during discovery proceedings, which would not be binding upon the applicant for intervention (since not even a judgment would be binding unless it were res judicata, *Sutphen Estate, Inc., v. U.S.*, 342 US 19), requiring disclosure only for discovery purposes in the action, came under Rule 24(a)(3).

5. Whether, as petitioner contends, such disclosure orders do not "dispose" or "distribute" "property" which is "subject to the control or disposition" of the court.

6. Whether, as petitioner contends, it has rights under its licensing contract, which permit it not only to use the formula, but to enforce all the benefits from its use, including the rights of action and causes of action arising therefrom; and that the disclosure orders do not come within the provisions of the contract, which does not provide for them; and that disclosure under the orders would not constitute a violation of the contract since it would not be "voluntary" and petitioner *did* use "reasonable precaution" (by continuous militant opposition to it) against involuntary disclosure.

7. Whether a stranger to an action, who has no interest in the subject matter thereof, will not gain or lose by the judgment therein, will not be bound by the judgment, whose interest in the formula and test is not being adjudicated and the title and possession to which is not being determined by the court, but which are only required to be disclosed for discovery purposes, can intervene by attempting to allege a controversy (questionable in any event) between itself and the plaintiff only, which does not involve the subject matter or the issues of the main action or the defendant.

The disclosure has not been made. The District Court ordered that no disclosure need be made pending this appeal.

STATUTES AND RULES INVOLVED.

The Rule directly involved on the appeal and in the opinion by the Court of Appeals was Rule 24(a) and (c), Federal Rules of Civil Procedure, set out, with part of (b), in the Appendix (*infra*, Appendix D, p. 12).

Indirectly involved in the presentation of the appeal to the Court of Appeals, and directly involved in the discovery proceedings in the District Court, out of which the appeal arose, were Rules 30(b) and 34, also set out in the Appendix (*infra*, Appendix D, pp. 13-14).

STATEMENT OF THE CASE.

1. Preface:

(1) The Parties.

The parties are petitioner, Hartley Pen Company, a California corporation and citizen, who is the plaintiff in the original action in the District Court; E. I. du Pont de Nemours & Co., a Delaware corporation and citizen,

the sole defendant in the said original action, hereinafter referred to as du Pont; Formulabs, Inc., a California corporation and citizen, which is not a party to the said action, hereinafter referred to as Formulabs.

(2) The Nature of the Appeal to the Court of Appeals.

Formulabs appealed from the order of the District Court of May 5, 1958 [Tr. 236-237] denying it intervention. *The sole issue on the appeal was whether Formulabs had established the right to intervene, as a matter of right, under* Rule 24(a)(3), F. R. C. P.

The determination of that issue involved first impression, and several other very important, questions of law.

Formulabs' attempt to intervene occurred during the discovery proceedings and directedly related to the District Court's orders to disclose trade secrets.

(3) The Record.

An original and nine copies of the printed Transcript of Record have been filed with the Clerk of this Court together with the typewritten copy of the proceedings in the Court of Appeals, the latter following in sequence the page numbers in the said Transcript of Record. All references herein to the said record will be made to "Tr.", followed by page numbers.

2. The Facts.

Petitioner has been for years and is manufacturing ball point pen inks, special ball points for ball point pens and component units consisting of the cartridge, the point and the inks. In manufacturing its inks it has used various formulas including a formula used by petitioner under license from Formulabs. In making its inks petitioner has

used, among others, du Pont's dyes. In ordering its dyes from du Pont petitioner has ordered by code. These dyes included du Pont's dyes known and referred to as Luxol Fast Blue MBS, also known as MBS and also known as Blue B dyes, hereinafter referred to as MBS.

Petitioner ordered from du Pont, under one purchase order, MBS dyes and received them at different times from August 26, 1953 to February 19, 1954. It used these dyes to manufacture inks in the same way it had in the past. It inserted these inks in the cartridges and sold them to its customers, who, in turn, sold them to their customers, throughout the country and the world. Beginning about February 3, 1954 petitioner began to receive serious complaints from its customers that the cartridges were defective and unfit for their use in ball point pens in that the inks therein would not write. These complaints multiplied. At that time petitioner was one of the, if not the, leading manufacturer in its field. Serious claims were made against petitioner, one of petitioner's largest customers, who was a leading national manufacturer and seller of complete ball point pens failed in business as a direct consequence of these defective cartridges. Petitioner not only faced large claims but was sued for substantial damages. None of petitioner's inks made before and after the period from August, 1953 to February, 1954 were defective and none jelled, *i.e.*, thickened so they would not write.

Petitioner immediately began research, inspection and investigation to determine the cause and eventually determined that only inks using substantial amounts of du-Pont's Lots 36 and 37 dyes jelled. Between February 8 and 12, 1954 petitioner reported its said troubles and said complaints to du Pont. During February, 1954 du Pont's

responsible employees met with petitioner in Los Angeles, California, and at du Pont's request, petitioner furnished it with samples of Lot 36 and other dyes and of its inks made from Lots 36 and 37 dyes which jelled and also its graphs, charts and records relative thereto, other information and some of the rejected pens, said records establishing that Lots 36 and 37 dyes caused the jelling of the inks. Petitioner then and thereafter constantly requested du Pont to determine the defect in its Lots 36 and 37 dyes, also for help and also for avoidance of a recurrence of the trouble. Du Pont conducted tests with the said dyes and inks received from petitioner, as well as its own dyes, for the avowed purpose of determining the cause of the jelling. During this period du Pont "discarded" its own samples of Lots 36 and 37 dyes, as well as its "work cards" (containing relevant data of its manufacture thereof) regarding the same. Generally speaking, the reported results of du Pont's viscosity tests showed that inks made from Lot 36 dye samples furnished by petitioner thickened and that the ink samples petitioner furnished du Pont and which were made from Lots 36 and 37 dyes jelled. Du Pont never advised petitioner of the actual defect in the dyes or the cause thereof.

Eventually, in September, 1954, du Pont denied the breach of any warranty or defect in its dyes. Petitioner's original action (hereinafter referred to as the main action) for breach of warranty and damages followed. Petitioner's damages ran into the millions, its business was almost destroyed, it lost many of its customers and its former leadership in its field was lost.

As noted *supra*, one of the formulas petitioner used in making said inks was licensed to petitioner by Formulabs.

The written licensing agreement (hereinafter referred to as the contract) between petitioner and Formulabs involved *one* formula, stated therein to be a secret one. The contract [Tr. 78-81] provided that in consideration of Formulabs' disclosing the secret of the formula to petitioner, petitioner would manufacture inks from it and pay a specified royalty to Formulabs and it provided that petitioner "undertakes and agrees that it will not in any way or manner make known, divulge or communicate the secret of said formula to any person or persons whomsoever, and will take all reasonable precautions against the secret of the said formula being learned or acquired by any unauthorized person or persons."

Petitioner pioneered Formulabs' said formula and established it commercially. Since then Formulabs, according to its president, has stated [Tr. 174] that said formula "is of great value to Formulabs, Inc., which has granted licenses to *many* manufacturers."

3. The Proceedings.

(1) Preface.

Petitioner considers that an adequate presentation of the discovery proceedings, out of which the appeal arose, is essential to present to this Court a proper perspective of this case.

Accordingly, petitioner respectfully prays this Court's indulgence in extending this petition beyond a cursory statement. Petitioner is most concerned in properly and adequately submitting this case to this Court.

Petitioner commenced the main action for breach of warranty and damages against du Pont in the Superior Court of the State of California in and for the County of Los Angeles on August 26, 1955 [Tr. 6-17].

Upon du Pont's petition for removal under 28 U. S. C. A. §1332 (diversity of citizenship and then value exceeding $3000) on September 15, 1955 the main action was removed to the District Court.

(2) The Complaint.

Petitioner's complaint alleged, generally, du Pont's warranties to it in its purchase of dyes from du Pont, which dyes petitioner used in the manufacture of ball point pen inks, the breach of said warranties and damages to petitioner. The complaint further alleged that Lots 36 and 37 of du Pont's MBS dyes, which it sold to petitioner knowingly for its use in manufacturing the inks, were latently defective causing the inks, which petitioner made and inserted in the pens, to jell, resulting in most substantial damages to petitioner.

(3) The Answer.

Du Pont's answer [Tr. 17-24] traversed the complaint's allegations and warranties, their breach and petitioner's resulting damages, and affirmatively alleged petitioner's failure to give notice, the barring of petitioner's cause of action by the statute of limitations and that petitioner did not rely on du Pont's representations.

Later, upon leave, over petitioner's objection, du Pont was permitted to file an amendment to its answer (which is not in the Transcript of Record) alleging that there was only one warranty, *i.e.*, merchantable quality, and that no notice of claim of its breach had been given within the allegedly prescribed period.

Accordingly, the issues, generally stated, were: What was the sale, or contract, between petitioner and du Pont, including what were the warranties; du Pont's breach of

the warranties and the resulting damages to petitioner. To these were added the said alleged affirmative defenses in du Pont's answer, as amended.

(4) Discovery Proceedings.

There were many discovery and other preliminary proceedings, not included in the Transcript of Record, including pleadings, motions, and proceedings regarding the same, du Pont's motion for summary judgment, which was denied, request for admission, interrogatories, and many depositions taken in various parts of the country.

[1] Du Pont's Interrogatories to Petitioner.

Among its original interrogatories to petitioner were interrogatory 32, which required petitioner to state "fully and in detail the contents of Formulabs' formula known as No. 280," and interrogatory 33, which required petitioner to disclose the identities and contents of all other formulas it used in making inks from Lots 36 and 37 dyes.

Petitioner objected to many of du Pont's interrogatories, particularly interrogatories 32 and 33, on several grounds, including that they called for the secret formula, that no showing had been made by du Pont why it could not be obtained from Formulabs, if otherwise competent and material, and that petitioner had contractual and other duties to Formulabs not to divulge the formula.

On the hearing of March 26, 1956 the District Court sustained petitioner's objections to interrogatories 32 and 33. As to interrogatory 32 the Court stated "I think that comes under the trade secret provisions" [Tr. 261]. Du Pont's attorney conceded that petitioner was "entitled to protection for a trade secret" and confessed that "it is a dilemma" [Tr. 261-262]. The District Court was at all

times aware of the said contract between petitioner and Formulabs. [Tr. 263]. As to interrogatory 33, du Pont's attorney conceded that its subparagraph c, which required disclosure of the formula, "must be stricken" and the District Court so ruled [Tr. 265-266].

At a chamber conference between the attorneys for petitioner and du Pont with the District Judge, before February 18, 1957, on various matters, not including the subject of the formula, the District Judge stated that he had reconsidered his ruling and would require disclosure of the formula. Du Pont had not made any motion, had not taken any proceeding of any kind and had not made any showing at all regarding this disclosure. The District Court acted *sua sponte*.

On the hearing of February 18, 1957 (on petitioner's interrogatories to du Pont and the latter's objections to them) the District Court advised that it would require the petitioner to furnish the formula at the pre-trial.

Thereafter, at various hearings, the District Court repeatedly stated that petitioner would have to disclose the formula or the action would be dismissed. This repeated threat to dismiss the action against petitioner was noted by the Court of Appeals in its opinion [Appendix A pp. 3-4], the Court of Appeals quoting some of the language of the District Judge.

Petitioner continuously and militantly objected to the disclosure.

On November 12, 1957 du Pont filed additional interrogatories [Tr. 42-44] to petitioner, including interrogatories 34, 35 and 41, which required petitioner to disclose the formula and petitioner's manufacturing process, and also interrogatory 37 requiring, for the first time, disclosure by petitioner of certain secret tests which had

been developed *after* the complaints had been received in February, 1954 by petitioner from its customers.

On November 12, 1957 du Pont also moved for production and inspection of all petitioner's records regarding its inks manufactured from 1952 to 1955 [Tr. 45-51].

Its notice of motion [Tr. 45] merely stated that the motion was made under F. R. C. P. Rule 34. Its motion [Tr. 46-47] listed the documents. Its attorney's affidavit [Tr. 48-51] stated that petitioner claimed, and du Pont denied, Lots 36 and 37 dyes caused the inks to jell [Tr. 48]; It then stated [Tr. 49] "The facts with respect to what went into the ink manufactured by plaintiff and what the processes and procedures were which were used by plaintiff in its ink manufacture become relevant. Thus paragraphs 1, 2, 5, 6, and 7 concern matters relevant to the subject matter of this action, or reasonably calculated to lead to the discovery of admissible evidence."

Petitioner objected to the additional interrogatories and to the motion, pointing out, among other things, that du Pont had received from petitioner its dye and ink samples made from Lots 36 and 37 dyes together with its charts and graphs, and that du Pont had its own Lots 36 and 37 dye samples and "has had every opportunity to analyze to the fullest extent" Lots 36 and 37 dyes, whereas it had consistently and successfully claimed trade secrets for its manufacturing process and procedures and refused petitioner inspection of its facilities and plant.

Petitioner contended that F. R. C. P. Rule 34 specifically required du Pont to show "good cause" for the disclosure of the trade secrets; that not only had du Pont not shown any good cause but it had *not* shown *any* cause and had made no effort to do so other than as mentioned in the documents *supra;* that du Pont had merely *asked*

for the disclosure in its interrogatories, which the District Court at first refused and then, *sua sponte*, ordered; that du Pont's motion and its documents, noted *supra*, merely *stated* its conclusion that the documents were revelant and reasonably calculated to lead to the discovery of admissible evidence.

Petitioner contended that this was clearly inadequate, citing the following,

> "A moving party's mere statement in his motion that he is entitled to the relief sought is insufficient as a showing of good cause."
>
> 2 Barron & Holtzoff, Federal Practice and Procedure (Rules Edition), §796, p. 500, n. 70 (and cases cited in the footnote).

Du Pont has never added anything to its said motion documents in support of the production and inspection of petitioner's records or its disclosure of its trade secrets.

Petitioner contended that under F. R. C. P. Rule 30(b) (*infra*, Appendix D, p. 13) trade secrets should be protected and in order to justify disclosure thereof, the trade secrets must be "either the very fact in issue or directly material and relevant thereto," or "clearly essential to the issues" or "indispensable to the ascertainment of the truth" [Tr. 152-157].

On the hearing of November 25, 1957 [Tr. 276-296] petitioner pointed out to the District Court that *du Pont had "discarded" its Lots 36 and 37 dyes and its work cards relative thereto and since it no longer had Lots 36 and 37 dyes, which it had deliberately discarded, it could not properly or relevantly use the formula to make any competent and admissible tests with those dyes.*

The District Court was adamant in requiring disclosure nevertheless [Tr. 64-65; 229].

On February 6, 1958 [Tr. 96-102] petitioner moved to vacate the disclosure orders and (if the District Court still ordered disclosure) for an adequate protective order, suggesting such a protective order, which included delivery of the trade secrets to the District Court with Formulabs participating (which Formulabs had advised petitioner it would do).

Du Pont opposed [Tr. 143-145] the motion on the ground that the protective order would "jeopardize" its defense and deny it due process in violation of the Fifth Amendment! It cited no authority in support of this ground.

The District Court was convinced that du Pont had knowledge of the ingredients of petitioners' inks made from Lots 30 and 37 dyes, which petitioner had furnished du Pont, as noted *supra* [Tr. 147]. The District Court said in that regard [Tr. 147]:

> "I think it is self-evident that the defendants know the materials in the samples that were submitted to them."

Also:

> "As I have stated before, undoubtedly the chemists know now what was in the different cartridges" (Referring to defendant's chemists).

When petitioner's attorney stated that du Pont claimed it could not determine this from its tests of the samples petitioner had furnished to du Pont, the District Court said:

> "I just don't believe that myself."

On the hearing of December 16, 1957 [Tr. 297] the District Court ruled that petitioner had to furnish the formula within 20 days after receipt of the transcript of the proceedings.

On the hearing of February 24, 1958 [Tr. 338] the District Court changed it to 60 days before the trial.

The District Court had been advised several times that Lots 36 and 37 dyes *jelled when used with the prescribed solvent, "carbitol," alone without the use of the formula, or any of its ingredients*, and since the solvent inherently could not jell, it followed that only the dyes caused the jelling.

Petitioner continued to resist the disclosure from the first announcement by the District Court of its intention to order it, on February 18, 1957.

At various hearings in opposing the disclosure petitioner pointed out to the District Court that Formulabs was not participating and that it should appear in some way to represent its interests.

[2] The District Court's Orders.

As noted, the District Court repeatedly ordered disclosure during the hearings, but it did not sign a formal order in that regard. However it did sign a formal order granting du Pont's motion to inspect and copy petitioner's documents, including the formula and its manufacturing process [Tr. 229-231]. This state of the record was noted by the Court of Appeals in its opinion [Appendix A pp. 2-3].

The District Court denied petitioners requests for a protective order.

Its disclosure orders are unqualified.

(5) Formulab's Attempt to Intervene.

[1] Its Motion to Intervene as Cross-Complainant [Tr. 74-75].

This was filed on February 5, 1958. Its stated ground was ". . . the property affected belongs to this petitioner and its rights of ownership will be seriously injured and even destroyed by certain disclosure of trade secret *to be made under the order" of the District Court* and that it desired "to protect that property against *such* injury and destruction." (Italics added.)

[2] Its Proposed Cross-Complaint [Tr. 75-81].

The material portion alleged that the inks petitioner made with du Pont's defective dyes were manufactured by petitioner using Formulabs' secret formula, which was widely used over the United States with "substantial income" to Formulabs; it set out its licensing contract with petitioner as an exhibit; that Formulabs also developed a secret testing process after petitioner's trouble, which it also disclosed to petitioner; that du Pont "seeks to learn and have disclosed to it" the secret formula and test; that the District Court on December 16, 1957, *"ordered the plaintiff to disclose to defendant"* the formula and test [Tr. 77]; that the disclosure *"as the Court has ordered would breach"* the contract; that Formulabs *"herein seeks to have plaintiff enjoined from the disclosure"* of its trade secrets [Tr. 78]; Formulabs prayed "for judgment and an injunction *enjoining plaintiff* herein from disclosing to defendant" [Tr. 78]. (Italics added.)

[3] Petitioner's Opposition to Formulabs' Attempt to Intervene.

This was expressed in documents and on hearings. Petitioner's position was, among other contentions:

(1) That although it had militantly opposed the disclosure and contended Formulabs should be permitted to take some proper proceeding regarding it, if so advised, petitioner opposed Formulabs' *pending* proceeding, which should be denied "without prejudice to it to take further and proper proceedings"; that petitioner's attorneys had stated to Formulabs' attorney that any review or test of the disclosure orders would have to be in the appellate courts.

(2) That Formulabs was uncertain under which of the various subdivisions of Rule 24 it claimed to qualify to intervene but that it did not qualify under any of them.

(3) That neither the issues of the main action nor the judgment which would be rendered therein involved or in any way affected title or possession to the formula and test and accordingly Formulabs did not come within Rule 24(a)(3).

(4) That the contract between petitioner and Formulabs (which was to be construed strictly against Formulabs which prepared it) obligated petitioner not to *voluntarily* disclose, and *to use "reasonable precaution"* against *involuntary* disclosure, to "unauthorized persons," *both of which petitioner had clearly performed.*

(5) That the disclosure order was not within the provisions of the contract and in any event neither the order nor disclosure thereunder could violate the contract and, further, disclosure under the order would not be a "publication" of the trade secrets and would not result in any injury or damage to Formulabs.

(6) That petitioner also owned the formula under the contract and had the right not only to use the formula but to enjoy the fruits of its use, which clearly included the right to enforce all rights of action and causes of action which arose out of petitioner's use thereof.

(7) That Formulabs had contractual duties to petitioner which were violated by Formulabs' attempt to intervene against petitioner.

(8) That Formulabs had not established its right to intervene under Rule 24(a)(3), which required that Formulabs be adversely affected by the District Court's *disposition* or *distribution* of the property, *which is the subject matter of the main action*, and that Formulabs' interest must be such that it would gain or lose by the direct legal operation of the *judgment*.

(9) That Formulabs had conceded that it had no interest in the subject matter of the main action nor any interest at all therein except against the disclosure by the order made during the discovery proceedings [Tr. 395].

(10) That the disclosure order did not "dispose" or "distribute" the trade secrets; that they were not "the subject matter of the main action" or an issue therein and that the judgment therein would not "dispose" or "distribute" or in any way affect the trade secrets.

(11) That there was no judgment involved but a discovery order.

(12) That even where a judgment is involved an applicant for intervention is not "adversely affected" unless it is *bound by* the judgment.

(13) That in any event Formulabs had no cause of action against petitioner on the contract because no violation of the contract by petitioner had been involved;

Formulabs' motion and cross-complaint explicitly stating that the disclosure "as the Court has ordered" would breach the contract.

(14) That the damages which would allegedly arise from the disclosure under the orders were too speculative and too contingent on unknown factors.

(15) That in any event, an applicant for intervention cannot introduce issues having no relation to those framed by the original complaint; cannot inject new or different issues; he takes the main action as he finds it; he cannot intervene for the purpose of having adjudicated a controversy solely between himself and plaintiff; the scope of intervention is limited to the field of litigation open to the original parties; and the subject matter of the applicant's claim (F. R. C. P. Rule 24(c)) must be the same as the subject matter of the main action.

That Formulabs did not satisfy any of such requirements.

(16) That whereas petitioner consistently opposed the disclosure, Formulabs, in its documents supporting its motion for intervention, and on the hearings, conceded that the District Court had the right to order the disclosure [Tr. 161-162, 345, 353].

(17) *That, further, Formulabs so conceded in its motion and cross-complaint by proceeding not against du Pont, who initiated the disclosure, nor against the order which required the disclosure, but against petitioner, who opposed the disclosure.*

(18) That Formulabs was not seeking to intervene to help petitioner but was proceeding so as to destroy petitioner's cause of action.

(19) That Formulabs was thereby attempting to create a legal hybrid (which had no discovered parallel in the

law) of seeking to intervene in order to obtain an order of the District Court directing petitioner not to comply with the same District Court's prior order of disclosure, thereby accomplishing a complete stultification.

That the horns of the dilemma on which petitioner found itself, ironically because of the operation of the salutary rules of discovery, *i.e.*, if it did not disclose as ordered, and the order became final, the District Court would dismiss the main action but if it did disclose, as ordered, Formulabs claimed that such disclosure breached the contract and Formulabs would cancel it and proceed against petitioner, was further complicated by Formulabs' seeking the District Court to order petitioner not to disclose as it had ordered it to do; that the next step would be the oft-threatened dismissal of petitioner's meritorious cause of action without any trial.

That the disclosure order in any event directed delivery of the formula and test to du Pont and the District Court and this was not the disclosure provided in the contract.

(20) That the cross-complaint did not state a good claim or cause of action since clearly it did not allege petitioner's breach of it and since it requested the District Court to enjoin petitioner from obeying its effective and outstanding disclosure order; that accordingly Formulabs showed no right, in any event, to intervene.

(21) That intervention must be timely; that timeliness depends on various factors, not only the time element but the circumstances, the state of the case and any prejudice that might result to the parties by reason of granting intervention; that Formulabs knew, prior to the hearing of November 25, 1957, of the District Court's ruling on February 18, 1957 requiring disclosure and had not moved for intervention until May 5, 1958; that undue

delay and inconvenience had resulted from Formulabs' attempt to intervene with special detriment to petitioner.

Petitioner cited supporting authorities for its contentions which will be noted *infra.*

[4] Du Pont's Opposition to the Intervention.

Generally speaking, it contended that the District Court had no jurisdiction to permit intervention since Formulabs was a California citizen and there were no independent grounds of jurisdiction, the intervention being on the basis of discretion and not of right since Formulabs had no interest in the subject matter of the main action and would not gain or lose by the direct legal operation of the judgment. Further, that Formulabs sought to prevent disclosure to du Pont which was necessary to its defense.

[5] The District Court's Order [Tr. 236-237].

Voluminous documents and substantial arguments were submitted to the District Court and it denied the intervention on May 5, 1958.

It epitomized Formulabs' attempt to intervene as follows [Tr. 388]:

It stated to Formulabs' attorney that he was attempting to intervene and to then *"get this court to enjoin one of the parties to the action from doing what I told him he had to do or the action would be dismissed."*

Thereupon Formulabs appealed to the Court of Appeals.

4. Contentions on the Appeal.

By Formulabs:

Generally speaking, Formulabs, after having contended in the District Court that it could intervene under various subdivisions of Rule 24, on the appeal, limited its right to intervene under Rule 24(a)(3); that the formula and tests were involved in the main action and were under the District Court's control or disposition; that the disclosure order distributed and disposed of the formula and test and that Formulabs was adversely affected thereby; that Rule 24(a)(2) required a judgment but Rule 24(a)(3) did not; that disclosure pursuant to the disclosure order violated the contract between petitioner and Formulabs.

Formulabs ignored petitioner's rights under the contract and its interest in the formula and the fruits of its use thereof.

By du Pont:

Generally speaking, du Pont repeated its contentions made in the District Court.

Again, however, du Pont did not show how the disclosure was indispensable or even necessary to its defense or what relevant and competent evidence it could obtain therefrom or what it intended to do with the formula and test and it continued to oppose any protective order.

By petitioner:

Generally speaking, petitioner's contentions on the appeal were an amplification of and an addition to its contentions in the District Court, emphasizing the fact that the sole measure of Formulabs' right to intervene, in any event, was the contract between petitioner and Formu-

labs, that petitioner had not violated it, that disclosure under the order would not constitute a violation of the contract; that Formulabs did not show a good claim or cause of action for intervention; that in any event Formulabs' claim in its cross-complaint was uncertain, undetermined and speculative, which had to be determined by litigation; that the contract was not unilateral but petitioner had rights and interests therein and Formulabs had obligations to petitioner thereunder; that under Rule 24 (a)(3), as under Rule 24(a)(2), the applicant for intervention must gain or lose by the direct legal operation of the judgment.

5. The Court of Appeals' Opinion [Appendix A pp. 1-9].

It stated [Appendix A pp. 4-5] that the sole issue was whether the District Court erred in denying Formulabs' motion to intervene, which was based on Rule 24(a)(3).

It noted [*Id.* p. 4] that the District Court had ordered that no disclosure be made pending the appeal.

It mentioned [*Id.*] that Formulabs had filed a motion to intervene to which was attached its cross-complaint and the licensing contract and that the cross-complaint prayed that petitioner be enjoined from disclosing the trade secrets.

But it did not set out the substance of the allegations of the cross-complaint or Formulabs' said theory, *i.e.*, that although the order was valid the disclosure pursuant to the order would be a breach of the licensing contract and that the District Court should order petitioner not to obey its own order to disclose. Nor did the Court of Appeals consider or decide petitioner's contentions in this regard. This may have been because it held that 24(c)

was not involved. It said in this regard [*Id.* p. 5] "Section (c) of the rule deals with procedure. Since no problem of procedure is involved we will not quote the provisions of section (c)."

This was one of the most serious contentions made by petitioner, *i.e.*, that all applicants for intervention must comply with section (c) and state *a good claim or defense upon which relief can be granted.* Petitioner contended that Rule 24(c) was an integral part of Rule 24 as a whole, including all of (a) and (b).

The Court of Appeals discussed the 1946 amendment effective in 1948, to Rule 24(a)(3), which clarified the question of court control, stating [*Id.* p. 6] that the amendment provided that the "property need not be actually in the custody of the court" or its officer if it was subject to the court's "control or disposition."

It said [*Id.*] "We have been unable to find any controlling decision which has interpreted or construed this amended sub-section."

It held [*Id.* pp. 6-8] that although under Rule 24(a)(2) the applicant for intervention must be "bound by" the judgment, "There is no such requirement contained in the provisions of Rule 24(a)(3)" [*Id.* p. 8].

It then [*Id.*] reasoned that under the "plain language" of Rule 24(a)(3) "any person has a right to intervene" if so situated as to be adversely affected by distribution or other disposition of property in the custody or subject to the court's control or disposition.

It then decided that the formula and test were within the custody or subject to the control or disposition of the District Court and that the disclosure order constituted a distribution or other disposition thereof which adversely

affected Formulabs, under Rule 24(a)(3). "There can be no question that Formulabs will be adversely affected by *an order* of the court requiring publication of these trade secrets" (*Id.* p. 9). (Italics added). Its rationale [*Id.*] was that Formulabs owned the secret formula and test, used by petitioner under the licensing contract, that petitioner had knowledge of the secret formula and test, was a party to the main action and subject to the District Court's jurisdiction and that the disclosure order constituted a "publication" of the trade secrets which would adversely affect Formulabs.

In reaching its conclusion, the Court of Appeals clearly held that the disposition or distribution of property under Rule 24(a)(3) may be by a discovery order and that it need not be by a judgment. In reaching this conclusion as well as its conclusion, noted *supra*, that Rule 24(a)(3) does not require the applicant to be bound by the judgment, the Court of Appeals held contrary to the following cases of other Courts of Appeals, submitted by petitioner and du Pont, as holding that a judgment is required under Rule 24(a)(3) and that thereunder the intervenor must be so situated as to be adversely affected by a distribution and that to authorize an intervention, the intervenor "must have an interest in the *subject matter of the litigation* of such a nature that he will gain or lose by the direct legal operation of the *judgment*;" *Pure Oil Co. v. Ross* (7th Cir. 1948), 170 F. 2d 651; *Kaufman v. Societe Internationale* (C. A. D. C. 1951), 188 F. 2d 1017; *Dowdy v. Hazefield* (C. A. D. C. 1951), 189 F. 2d 637, cert. den. 324 U. S. 830; *Kelley v. Summers* (10th Cir. 1954), 210 F. 2d 665; *Peckham v. Ronrico Corp.* (1st C. A. 1954), 211 F. 2d 727.

The Court of Appeals cited [*Id.* p. 7] *Kelley v. Summers, supra,* relative to Rule 24(a)(2) but did not con-

sider its quoted language, *supra*, regarding Rule 24(a)(3). It did not cite or discuss *Peckham v. Ronrico Corp., supra*, or *Kaufman v. Societe Internationale, supra*. It distinguished [*Id.* pp. 7-8] *Dowdy v. Hawfield, supra*, and *Pure Oil Co. v. Ross, supra*, by stating that they were factually distinguishable and that neither opinion contained an "analysis of Rule 24(a)(3)."

It unequivocally held that Formulabs had the right to intervene, as a matter of right, and thereupon reversed the order of the District Court denying intervention.

In so holding, it held that disclosure under the orders came within the provisions of the contract, although the contract does not so provide, is limited in scope to only two factors, (*i.e.*; that petitioner do not *voluntarily* disclose and that he use "reasonable precaution" against *involuntary* disclosure) and although the contract involves only *one* formula, whereas the disclosure orders relate to the test and also other formulas.

In so holding, it also held that Formulabs can litigate in the main action its separate cause of action on the contract against petitioner alone, which has no relevancy to any of the issues or the subject matter of the main action or to du Pont.

6. Petitioner's Petition for Rehearing.

Petitioner filed its petition for rehearing on March 16, 1960.

Among its contentions were the following:

(1) That the Court of Appeals assumed that the disclosure order would violate the contract between petitioner and Formulabs, whereas Formulabs had conceded the order was valid and in its cross-complaint alleged: that *du Pont*

sought disclosure (not that petitioner voluntarily wanted to give it); that the *District Court ordered disclosure* (not that petitioner wanted to make it); that disclosure "*as the Court has ordered* would breach" the contract (not that petitioner would breach it).

(2) That Formulabs in its intervention proceedings conceded that the disclosure would be by the order and not by petitioner voluntarily and that the alleged violation of the contract was not by petitioner but by the District Court. Petitioner submitted that the District Court could *not* breach the contract.

(3) That the contract provided against petitioner's voluntary disclosure, and failure to exercise "reasonable precaution" against involuntary disclosure. That Formulabs did not allege or show either. That the record clearly showed petitioner was not doing either.

(4) That not only the contract but Formulabs' intervention proceedings, including its cross-complaint, only related to *one* formula and accordingly neither the test nor the other formulas involved in the disclosure orders came within the contract or the intervention proceedings and Formulabs had no such right relative thereto.

(5) That the Court of Appeals did not consider petitioner's contentions regarding its rights and interests in the contract and the right not only to use the formula in making inks but to use it in enforcing all its resulting rights, including its right of action and causes of action arising therefrom.

(6) That the disclosure order did not constitute "publication."

(7) That the Court of Appeals did not consider petitioner's contentions as to the requirements for interven-

tion, *i.e.*, that the applicant cannot inject new or different issues; that he must have such an interest in the subject matter of the main action that he will gain or lose by the direct legal operation of the judgment; that the subject matter of his claim must be the same as the subject matter of the main action; that he cannot intervene to have adjudicated a controversy solely between himself and plaintiff; that he takes the main action as he finds it; that the scope of the intervention is limited to the field of litigation open to the original parties.

(8) That although the Court of Appeals did not consider Rule 24(c), as noted, stating (*Id.* p. 5) that "no problem of procedure is involved," *it was involved*, petitioner strenuously arguing that the cross-complaint was an anomaly in the law and did not state a cause of action or a claim as required by Rule 24(c).

That under Rule 24(c) the statement must be of a *good* claim *on which relief can be granted*, citing,

2 *Barron & Holtzoff, Federal Practice and Procedure*, (which title will hereafter be omitted), §603, p. 233, n. 99;

4 *Moore's Federal Practice* (which title will hereafter be omitted), §24.14, p. 101, n. 1;

Schurtz v. Foster & Kleiser, (D. C. Cal. 1939), 29 F. S. 162.

Petitioner pointed out that Formulab was proceeding against it and not against the order or du Pont all the while conceding that the order was valid.

Petitioner pointed out that the intervenor cannot set up a completely private controversy between himself and the plaintiff or the defendant but must either question the propriety of the proceeding (4 Moore's, §24.16[3],

pp. 114-16) or contest the merits of the claim or the defense. (4 Moore's, §24.16[4], pp. 116-20).

That accordingly, the Court of Appeals in not considering Rule 24(c), did not decide a crucial element in the appeal, *i.e., the very basis of Formulabs' qualification to intervene.*

(9) That Rule 24 is an integral rule and 24(c) is involved and applies to all the subdivisions of Rule 24 (a) and (b).

Rule 24(c) clearly states that anyone seeking to intervene shall serve a motion therefor, stating its grounds, which shall be accompanied "by a pleading setting forth the claim or defense *for which intervention is sought.*"

That the Court of Appeals held, in effect, that the owner of any interest in property may, by virtue of said ownership alone, *ipso facto,* intervene, without showing the required good claim upon which relief can be granted.

This is so because Formulabs made no such showing and yet the Court of Appeals held that it was entitled to intervene, as a matter of right.

That the only basis the District Court had, and which any court has, to determine the right to intervene is by the motion and the pleading of the claim relative thereto.

The only basis the District Court or the Court of Appeals had to decide Formulabs' right to intervene was to consider its motion and cross-complaint and test it against the requirements therefor.

There is no authority for this construction by the Court of Appeals.

As an illustration, assume that petitioner had voluntarily disclosed, on the theory that it had a right to do so because of its ownership of the formula for the purposes

of its full use (bearing in mind all these considerations that the contract must be strictly construed against Formulabs who drew it, under fundamental principles of construction of documents) and that further, the disclosure was under court order. Could it then have been contended that Formulabs could intervene in the main action and therein *litigate its contract* between it and petitioner alone?

It is submitted that the answer is obvious.

There is no substantial difference between that situation and the present one.

(10) That in holding that under Rule 24(a)(3) the disposition or distribution of the property could be made by a disclosure order and need not be made by a judgment and in holding that a judgment was not required under Rule 24(a)(3) as it was in 24(a)(2), the Court of Appeals stands alone.

As noted *supra*, petitioner quoted from the following cases: *Pure Oil Co. v. Ross, supra, Kaufman v. Societe Internationale, supra, Dowdy v. Hawfield, supra, Kelley v. Summers supra, and Peckham v. Ronrico Corp., supra.*

(11) That the Court of Appeals did not consider or determine petitioner's contention that the attempted intervention was not timely.

(12) *That if the Court of Appeals' construction of Rule 24(a)(3) is correct, then an applicant for intervention need not be bound by the judgment, there need not be any judgment, it is immaterial whether his interest is adequately represented, but he can intervene without either factor; that then there would be no reason or purpose for Rule 24(a)(2) since Rule 24(a)(3) would be all-encompassing, including the situations in 24(a)(2).*

That Formulabs was not "so situated as to be adversely affected by the distribution or disposition of property" because of the following reasons, among others:

[1] Since Formulabs conceded the validity of the order it could not be adversely affected by it and its said concession was a waiver.

[2] Since the contract was the source and measure of Formulabs' right to intervene and the disclosure orders were not within the provisions of the contract, the order could not adversely affect Formulabs.

[3] That since Formulabs conceded it had no interest in the subject matter of the main action or any interest at all except against disclosure, it was therefore not "so situated" as required by Rule 24(a)(3).

[4] That the disclosure orders did not "distribute" or "dispose" of "property" as contemplated by the rule; that not even a judgment did so unless it was binding on the applicant.

[5] That Rule 24(a), considered as a whole, contemplated a judgment under 24(a)(3) and not a discovery order.

(13) That in holding that Formulabs could intervene on its cross-complaint, it could be contended in the District Court, upon the return of the Court of Appeals' mandate, that the Court of Appeals thereby held that Formulabs showed that it was entitled to the relief sought in its cross-complaint; *i.e.*, an order from the District Court directing petitioner not to obey the disclosure orders. Similarly, that it might be also contended that this was a mandate to the District Court to do so.

That this would result in a dismissal of the main action against petitioner without any trial and would constitute a construction and a determination of the contract, upon which Formulabs' cross-complaint was based, without the opportunity to petitioner to litigate it upon the evidence and the law.

That in any event, the Court of Appeals' decision permits Formulabs to intervene for the sole purpose of having construed and determined the contract between it and petitioner, a matter completely irrelevant to the issues of the main action and to its subject matter, contrary to all the authorities, including the decisions of this Court, noted *infra*.

(14) That the Court of Appeals' decision may result in petitioner being long delayed in its enforcement of its cause of action in the main action or having it destroyed, thereby depriving it of a substantial property right under circumstances which would constitute, among other improprieties, partially noted *supra*, countenancing of a patent violation by Formulabs of its contract with petitioner and its legal obligations to petitioner.

(15) That Formulabs did not allege a cause of action under the contract for intervention and did not show its qualifications otherwise to intervene under Rule 24 (a)(3). That on the contrary, the record clearly shows that it did not and cannot, under its present theory and position, qualify for intervention thereunder.

7. The Court of Appeals' Order Denying Rehearing.

The Court of Appeals denied the rehearing on April 8, 1960 (Appendix C, p. 11).

REASONS FOR GRANTING THE WRIT.

1. The following questions regarding discovery orders directing disclosure of the formulas and test, involved in this appeal (which are not the subject matter of the main action or in issue therein, the title and possession to which is not at all involved in the main action and which will not be affected in any way by the judgment therein) are all of first impression and petitioner's research has indicated that they have not been decided by this Court or any other Court of Appeals; they are of peculiar gravity and general importance:

(1) Whether such discovery orders or any discovery order (requiring disclosure of information) come within Rule 24, particularly 24(a)(3).

(2) Whether such formulas and test are "subject to the control or disposition" of the District Court in such discovery proceedings within the meaning of said Rule.

(3) Whether such discovery orders "dispose" or "distribute" the said formulas and test within the meaning of said Rule.

(A) This Court has granted certiorari to determine important questions of federal procedure, including discovery proceedings in the following, among other, cases:

Carpenter v. Winn, 221 US 533;
Westinghouse v. Wagner Mfg. Co., 225 US 604;
Hickman v. Taylor, 329 US 495.

The *Carpenter* case involved Section 724 of the Revised Statutes, relating to the production and inspection of records. Plaintiff obtained an order for such production and inspection. Defendant refused to comply with the order, his default was entered and a jury was enpaneled to determine the damages. The Court of Appeals affirmed

the judgment. The question involved was whether the discovery could be required *before* or *at* the trial.

This Court stated (p. 543) "The statute has never been construed by this Court" and granted certiorari.

In the *Westinghouse* case this Court held that although the statute made decisions of the Court of Appeals final in patent cases, it granted certiorari to determine the important question of who had the burden of proof (as to separating profits and similar matters).

The *Hickman* case is too well known to require more than mere mention as to its decision regarding, and effect upon, discovery proceedings.

(B) This Court has granted certiorari in cases involving interlocutory orders.

Gay v. Ruff, 292 US 25.

2. The following questions regarding the said discovery orders and the contract between petitioner and Formulabs (which is necessarily involved in the determination of this appeal, and actually construed and determined by the Court of Appeals) are all of first impression, and petitioner's research has indicated that they have not been decided by this Court or any other Court of Appeals; they are of peculiar gravity and general importance:

(1) Whether the contract, drawn by Formulabs, and specifically limited in its scope (*i.e.*, requiring petitioner not to *voluntarily* disclose, and to use reasonable precaution against *involuntary* disclosure, to unauthorized persons) covers disclosure under the said discovery orders.

(2) Whether said contract, which specifically relates to only *one* formula whereas the disclosure orders relate to other formulas as well as the test, covers the discovery order and the other formulas and tests.

(3) Whether disclosure under the said discovery orders would be disclosure in the sense meant and contemplated by the contract.

(4) Whether said disclosure would violate the said contract.

(5) Whether petitioner also has substantial rights and interests in the contract, including not only the right to use the formula but the right to enforce all the benefits resulting from its use thereof, including the right to enforce all rights of action and causes of action arising therefrom.

(6) Whether the disclosure order, which Formulabs concedes is valid, and which it does not seek to effect in any way, can be claimed by Formulabs to constitute a violation of the contract.

3. The following questions regarding Formulabs' proceedings to intervene, as they arose and are involved in this case, and as they were determined by the Court of Appeals, are all of first impression, and petitioner's research has indicated that they have not been decided by this Court or any other Court of Appeals; they are of peculiar gravity and general importance:

(1) Whether the formulas and test (involved only in the discovery proceedings) which are not the subject matter of the main action, which are not in issue therein, the title to which and the possession of which are not at all involved in the main action, and the judgment in which will not at all affect them, are nevertheless "subject to the control or disposition of the court" within the meaning of Rule 24(a)(3).

(2) Whether Formulabs, who concededly has no interest in the subject matter of the main action, will not gain or lose by the direct legal operation of the judg-

ment, and is in no way interested in the main action except regarding the disclosure, comes within the provisions of said Rule.

(3) Whether Formulabs can be "adversely affected" by the "distribution" or "disposition" of "property" by the disclosure order within the meaning of said Rule, this including the question, noted *supra*, whether the disclosure order "distributes" or "disposes" of "property"; also whether the formulas and test involved only in the discovery proceedings are "property" within the meaning of that Rule; also whether Formulabs, which concedes the validity of the disclosure order and does not proceed against it but only against petitioner, in the peculiar manner in which it did in this case, can be "adversely affected" within the meaning of said Rule.

(4) Whether Formulabs can intervene, as a matter of right, on its cross-complaint, the subject matter of which is not the same as the subject matter of the main action.

(5) Whether it can intervene, as a matter of right, to have adjudicated the controversy as to the contract between it and petitioner only, which is not at all involved in the main action and which does not involve du Pont.

(6) Whether it is the law that the scope of intervention is limited to the field of litigation open to the original parties and cannot be enlarged by the applicant for intervention seeking to have adjudicated a controversy solely between itself and plaintiff.

(7) Whether it is the law that an applicant for intervention takes the case and its issues as it finds them.

Petitioner submits that hereunder (and in holding that Formulabs could intervene as of right) the Court of Appeals has conflicted with this Court's decisions determining the right to intervene.

(A) The applicant for intervention must have an interest in the *subject matter* of the main action.

Krippendorf v. Hyde, 110 US 276.

As noted, Formulabs concededly does not have any such interest [Tr. 395].

(B) Intervention is permitted in proper cases *where no new, separate and distinct matters are introduced by the intervention*, where the *subject matter is the same* and where *conflicting claims to property*, which is the *subject matter* of the action, can be determined.

Morgan's Company v. Texas Central Railway, 137 US 171.

(C) An applicant cannot intervene for the purpose of having adjudicated a controversy solely between it and plaintiff, nor can it enlarge the issues tendered by and arising out of plaintiff's complaint. The scope of intervention is limited to the field of litigation open to the original parties.

Chandler Co. v. Brandtjen, Inc., 296 US 53.

(D) An applicant takes the case as he finds it.

2 Barron & Holtzoff, §593, p. 203 n. 16.

4. The decision of the Court of Appeals that Formulabs' cross-complaint states a cause of action and therefore a "claim . . . for which intervention is sought" under Rule 24(a)(3), by seeking the District Court to enjoin petitioner not to obey its prior disclosure orders, which are still in effect, is without precedence in logic or law and is of peculiar gravity and general importance.

It is submitted that such procedure has "so far departed from accepted and usual course of judicial pro-

ceedings" as to urgently suggest this Court's granting certiorari.

Letuele v. Scofield, 308 US 415;

36 C. J. S., Federal Courts, §204(b), p. 101, n. 10.

It is neither logical nor legal, and there is no authority to support it. It is submitted patent that to request any court to nullify its prior order (which the applicant does not seek to vacate or modify and which therefore remains in full force and effect) by making another order directing that the first order be not obeyed, is inordinate.

This Court granted certiorari in *Letuele v. Scofield*.

5. The following question is of first impression and of far-reaching importance and consequence and petitioner's research has indicated it has not been decided by this Court or any other Court of Appeals:

Whether Rule 24(c) is necessarily involved in, and applies, to, *all* the subdivisions of Rule 24, including 24 (a)(3).

As noted, the Court of Appeals held that it was not involved (*Id.* p. 5) and therefore did not consider petitioner's most serious contentions to that effect.

Petitioner contends it is so involved.

Petitioner submits that Rule 24(c) is an integral part of Rule 24, including (a) and (b); that this is patent from the context of the rule and from the clear language of the first sentence of 24(c), which reads "A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby" (to be accompanied by a proper claim "for which intervention is sought").

There is no qualification to this requirement and, of course, under fundamental rules of construction, it applies to all of Rule 24.

The Court of Appeals accordingly did not consider petitioner's contention that Formulabs did not qualify for intervention because of its failure to comply with Rule 24(c).

Rule 24(c) requires that an applicant for intervention set forth his claim or defense "for which intervention is sought."

The purpose of this rule is to inform the court and the parties of the grounds and basis for the attempted intervention so that the court can determine *therefrom* whether the applicant is entitled to intervene.

> *International Brotherhood of Teamsters, etc. v. Keystone Freight Lines*, 123 F. 2d 326;
> *7 Cyc. of Fed. Proc.*, 38.

> "The proposed complaint or answer of the intervenor must state a well-pleaded claim or defense . . ."
>
> 4 *Moore's*, §24.14, p. 101, n. 1.

As noted *supra*, Rule 24(c) requires the statement of a *good* claim *upon which relief can be granted.*

> *2 Barron & Holtzoff*, § 603, p. 233, n. 99;
> 4 *Moore's*, §24.14, p. 101, n. 1;
> *Schurtz v. Foster & Kleiser, supra.*

In *Hoffman v. McClelland*, 264 US. 552, this Court affirmed the judgment refusing intervention. In considering the question of whether the property was *impounded* in the main action, and therefore the applicant for inter-

vention entitled to intervene, this Court turned to the only basis for such determination, *i.e.* (p. 558).

> "The pleadings, order and decree in that suit, which was before the court at the time, are set forth in the present record, and they show that the property was not impounded in that suit."

6. The Court of Appeals' decision that Rule 24(a)(2) but not Rule 24(a)(3) involves a judgment, conflicts with the decisions of other Courts of Appeals on the same matter.

The Court of Appeals unequivocally held that although Rule 24(a)(2) involves a judgment, Rule 24(a)(3) does not (*Id.* pp. 5-9).

As noted, *supra*, in so holding it stands alone.

In *Pure Oil Co. v. Ross, supra*, the Court (pt. 4) p. 653, stated

> "Rule 24(a)(3), Federal Rules of Civil Procedure, 28 U.S.C.A. permits anyone upon a timely application to intervene in an action as a matter of right *when* the applicant is *so situated as to be adversely affected* by a *distribution* of property in the custody of the court or of an officer thereof, and the law is *well settled*, that to authorize an intervention, the intervenor must have an interest in the *subject matter of the litigation* of such a nature that he will gain or lose by the direct legal operation of the *judgment.*"

In *Kaufman v. Societe Internationale, supra*, p. 1018, the Court in stating that Rule 24(a)(3) was inapplicable said

> "The law is *well settled* that one entitled to intervene as a matter of right under Rule 24(a)(3),

F.R.C.P. 'must have an interest in the *subject matter of the litigation* of such a nature that he will gain or lose by the direct operation of the *judgment*'", citing the *Pure Oil* case.

In *Dowdy v. Hawfield, supra*, the Court held (pts. 4-5), p. 638,

"The law is well settled that one entitled to intervene as a matter of right under Rule 24(a)(3), F.R.C.P. 'must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment'", citing the *Pure Oil* case and holding that "Such is not the case here."

This Court denied certiorari in the *Dowdy* case, 342 US 830.

In *Kelley v. Summers, supra*, the Court discussed Rule 24(a) *generally* and considered Rule 24(a), *as a whole*, to which it applied the following language (pt. 13), p. 673,

"'F.R.C.P. Rule 24(a) deals with intervention of right. . . . To authorize an intervention as of right under Rule 24(a) the intervenor must have an interest in the *subject matter of the litigation* of such a nature that he will gain or lose by the direct legal operation of the judgment," citing the *Pure Oil* case.

In *Peckham v. Ronrico Corp., supra*, the Court held that Peckham could be adversely affected by the distribution or disposition of the shares of stock *by the judgment in the main action and that therefore* Rule 24(a)(3) applied. It said (pt. 6), p. 732,

"Since we cannot see how Peckham as Ferd's judgment creditor can escape being adversely affected to

at least some extent from a disposition of shares in Penrico *pursuant to a judgment* for the defendants on a complaint, it follows that Rule 24(a)(3) applies and Peckham is entitled to intervene as a matter of right."

Petitioner submits that the facts may differ (as they do in all cases, even those approximating parity, since difference is merely a matter of degree) but the legal principle applicable to an area or topic of the law, within which the facts come, stands established despite some difference in the facts. The principle is constant although the facts may vary.

Since this appeal involves a construction of Rule 24 (a)(3), the repetition of a consistent construction by various courts and textwriters should be given some weight; certainly more than the complete absence of any contrary construction by court or textwriters.

7. The Court of Appeals unequivocally held that a discovery order relating to formulas and a test, which were not issues in the main action and were not the subject matter thereof, constitutes a "distribution" or "disposition" of property within the meaning of Rule 24(a)(3):

This is a first impression decision and is not supported by the said decisions of the said other Courts of Appeals nor by the construction of Rule 24 as a whole and in context.

Its decision that the formula and test "are subject to the control or disposition of the court" (*Id.* p. 9) because of the disclosure order, is inconsistent with this Court's decision of *Hoffman v. McClelland, supra.*

As noted *supra*, in the *Hoffman* case, in affirming a denial of intervention, this Court clearly distinguished be-

tween the court's custody and control of property and its orders relative thereto.

It further clearly illustrated what constitutes "custody, control or disposition by the court."

The amendment to Rule 24(a)(3) in 1946, effective in 1948, merely clarified the one point, *i.e.*, that the property need no longer be in the custody but could be "subject to the control or disposition" of the court. This is precisely the point decided by this Court in the *Hoffman* case.

On page 558 thereof, this Court stated

> "It is settled that where in progress of a suit in a federal court property has been *drawn into the Court's custody and control*, third persons claiming interests in or liens upon the property may be permitted to come into the Court for the purpose of setting up, protecting and enforcing their claims, altnough the Court could not consider or adjudicate their claims if it had not *impounded* the property. . . ."

In further describing the case this Court stated that the district court had not taken over the administration of the trust, nor "*drawn into itself the custody and control of the property.* It had determined a controversy between" various parties. *This Court stated that the district court had adjudicated ownership of interests in the trust, had prohibited delivery by the trustee except under conditions and the court's order and retained jurisdiction to compel full adherence to that prohibition. "But it did not acquire or assume any other power of direction or control over the property."*

It is submitted that the District Court in the *Hoffman* case did more than the District Court's disclosure orders do in this case but neither "distributed" or "disposed" of the property. Further, in the *Hoffman* case the trust, *i.e.*, "the property," was the very subject matter of the main action whereas the formulas and the test are not the subject matters of the main action in this case or even in issue therein, and the right and title thereto is not at all involved in this case.

8. The Court of Appeals' decision involves a first impression question of far-reaching importance, *i.e.*, that under Rule 24(a)(3) a judgment is not involved, as it is in Rule 24(a)(2), and that under Rule 24(a)(3) the applicant need not have such an interest in the *subject matter of the litigation* of such a nature that he will gain or lose by the direct legal operation of the *judgment.*"

The Court of Appeals unequivocally so held as noted *supra*, thereby conflicting with the decisions of other Courts of Appeals, noted *supra*, and with the rationale of this Court's decisions, noted *supra*.

It is submitted that it also conflicts with a reasonable statutory construction.

As illustrative of the fact that Rule 24(a) must be considered as an integral rule and in support of petitioner's contention that Rule 24(a)(3) contemplates a judgment, and such an interest by applicant in the subject matter of the litigation that he would gain or lose by the direct legal operation of the judgment, as stated in the various decisions cited by petitioner, noted *supra*, and further considered *infra*, petitioner submits the following:

Under Rule 24(a)(2) two factors are necessary: the applicant for intervention must be bound by the judg-

ment *and* the representation of his interest by existing parties must be adequate.

The same Court of Appeals held in *Farmland Irrigation Co., Inc. v. Dopplmaier,* (9 C. A. 1955), 220 F. 2d 247, that the fact that the applicant for intervention may be bound by the judgment is not enough, it must *also* show that its interest is inadequately represented. And it limitedly defined "inadequate" representation as being such as involves collusion or impropriety.

If the Court of Appeals' said construction of Rule 24(a)(3) is correct that an applicant for intervention need not be bound by the judgment (in fact that there need be no judgment) and that it is completely immaterial whether his interest is being adequately represented, but that he can come in without either factor, then *why* Rule 24(a)(2)?

Anyone could then qualify under Rule 24(a)(3) since if the Court of Appeals' construction thereof is correct, anything less than a judgment (and up to and including a judgment) and whether the judgment bound, or not, and whether there was representation, adequate or inadequate or none, would entitle intervention as of right.

Since the Court of Appeals has held that one may be adversely affected although adequately represented, one who is not adequately represented would also be adversely affected as would one who is not represented at all. So the factor of "adversely affected" would cover the entire range of representation, from its complete absence to its most competent existence.

Since the Court of Appeals has held that one may be adversely affected although there is no judgment (binding or not) and although there is only a disclosure order, then again, the factor of "adversely affected" would

cover the entire range of judicial action from an order during discovery proceedings to and including a final judgment.

Thus, Rule 24(a)(3) would be all-encompassing and would include the situations in 24(a)(2). There would then be no purpose for 24(a)(2) at all.

Thus, under 24(a)(3) anyone who was not represented at all could intervene; one who was adequately represented could do so and one who was inadequately represented could do so; and anyone of these three could intervene in any of these three situations: when the judgment was binding, or when it was not binding or when there was no judgment involved at all.

But under 24(a)(2) one who was bound by an order but not a judgment could not intervene. Nor could one in a case where the judgment was not binding. Nor could one who was bound by a judgment but was represented. One could only intervene under 24(a)(2) when the two factors existed, a binding judgment and inadequate representation.

Thus 24(a)(2) would have been enacted to cover only one strictly confined situation, which would be included in the unlimited application of 24(a)(3).

Is this logical?

Without referring to established principles of statutory (and rule) construction, is one subdivision of a statute to be construed to cover all situations, including each of all the other separately stated subdivisions thereof? Would such a statute (or rule) be sensible enactment? Is such construction sound?

It is submitted that it is not and this Court should decide the point.

9. In permitting Formulabs to intervene on its cross-complaint the Court of Appeals construed the contract between petitioner and Formulabs without opportunity to petitioner to participate therein and without a trial upon the evidence and the law.

The Court of Appeals could not have decided to permit intervention unless it had decided, as it did, that Formulabs stated a cause of action. Formulabs could only do so upon its cross-complaint, which was based upon the contract. Formulabs unequivocally alleged that disclosure under the District Court's order would violate the contract. The Court of Appeals agreed with this.

Petitioner contends that it is patent from the contract that disclosure under the Court's order is not within the provisions of the contract and does not violate it.

Accordingly, this construction was made without opportunity to petitioner to litigate this issue and is a decision of far-reaching importance and consequence to petitioner.

It is similar in principle to, though it is not in factual parity with, the situation involved in this Court's decision in *Letucle v. Scofield, supra* (particularly page 416 of the decision).

10. Rule 24, including 24(a)(3), was not intended to enlarge or alter federal jurisdiction.

2 *Barron & Holtzoff*, §593, p. 202;

Bantel v. McGrath, 251 F. 2d 297.

The Court of Appeals' decision does so.

If there is a hiatus in the Rules in not encompassing the issues presented on this appeal, it is a matter within the rule-making power and not for "judicial legislation" by the Court of Appeals.

11. The various important questions of law, noted *supra,* which this Court has not decided, are of far-reaching importance in general, and of crucial importance in particular in this case and it would be of great general importance and welfare to have them decided by this Court.

This is, of course, a ground upon which this Court has granted certiorari.

36 C. J. S., Federal Courts, §204(b), p. 110, n. 8.

CONCLUSION.

In addition to the strictly factual and legal bases for this petition, petitioner particularly submits for consideration the ironical development in this case, directly involved in this appeal, that the salutary discovery rules, whose patent object is the expeditious ascertainment of the truth in the efficient administration of justice, have not so functioned in this case but have resulted herein in being so used and applied as to delay petitioner, so far, in enforcing its meritorious cause of action by the requested jury trial, and in endangering petitioner's case by having it dismissed, all by the strange and unprecedented procedure of Formulabs' unusual cross-complaint.

Petitioner most urgently and respectfully prays that this Court grant certiorari in this case.

Dated: May 9, 1960.

Respectfully submitted,

OWEN A. BARTLETT and A. V. FALCONE,

By A. V. FALCONE,

Attorneys for Petitioner Hartley Pen Company.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Formulabs, Inc., Appellant, vs. Hartley Pen Company and E. I. du Pont de Nemours & Company, Appellees. No. 16,140. Feb. 15, 1960.

On Appeal from an Order of the United States District Court for the Southern District of California, Central Division.

Before: BARNES and JERTBERG, Circuit Judges, and JAMESON, District Judge.

JERTBERG, Circuit Judge.

Hartley Pen Company, a California corporation, the plaintiff in the district court and one of the appellees on this appeal, filed a complaint against E. I. du Pont de Nemours & Company, a Delaware corporation, the other appellee on this appeal, in the Superior Court of the State of California, in and for the County of Los Angeles, alleging breach of warranty. Such parties will hereafter be referred to respectively as Hartley and du Pont. The action was transferred to the United States District Court for the Southern District of California, Central Division, on petition of du Pont.

Jurisdiction was vested in the district court under the provisions of Title 28 U.S.C.A. § 1332, by reason of diversity of citizenship, the amount in controversy exceeding the sum of $10,000 exclusive of interest and costs.

It appears from the record that Hartley manufactures ball point pens incorporating cartridges filled with ink made under a secret formula comprising a trade secret belonging to Formulabs, Inc., the appellant on this appeal,

which appellant will hereafter be referred to as Formulabs. The use of the secret formula by Hartley was under the terms of a written license agreement between Hartley and Formulabs.[1]

The ink manufactured by Hartley and placed in the cartridges incorporated a dye purchased by Hartley from du Pont. In August 1953 du Pont sold to Hartley lots 36 and 37 of blue B dyes. The complaint alleges that the inks made by Hartley using dye lots 36 and 37 proved to be defective and unmerchantable. Hartley claimed that it suffered general and special damages in large amounts as the proximate result of the alleged defective and unmarketable dye.

Du Pont filed its answer to the complaint, in which it denied most of the material allegations of the complaint. In its second defense du Pont alleged that it had been advised in October of 1952 by Formulabs that Formulabs had licensed Hartley to manufacture ink according to a formula developed by Formulabs using du Pont's dye, and that in the future Hartley would purchase from du Pont the dye to be used in said ink.

As part of its discovery proceedings du Pont sought to learn the Formulabs secret formula used by Hartley in the formulation of the alleged defective ink using the alleged defective dye, lots 36 and 37, as well as certain of

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[1]The license agreement states that Formulabs is the owner of a secret formula for making ball pen ink which Hartley, engaged in the manufacture of ball pen inks, desired to use in the manufacture of ink. Under the license agreement Hartley agreed, among other things that it would not "in any way or manner make known, divulge or communicate the secret of said formula to any person or persons whomsoever, and will take all reasonable precaution against the secret of said formula being learned or acquired by any unauthorized person or persons."

Formulabs' secret test procedures which had been disclosed to Hartley. On du Pont's motion for production and inspection of documents, made under Rule 34, Federal Rules of Civil Procedure, and over the objections of Hartley, the district court granted du Pont the right to inspect documents in Hartley's custody or under its control. It is conceded that such inspection would presumably disclose the secret formula and test procedures. Among the interrogatories propounded by du Pont to Hartley were interrogatories 34 and 37. Interrogatory 34 is in the following form:

> "State in detail the formula and procedure used and/or followed by plaintiff in manufacturing each and every batch of ink which plaintiff contends was defective because Lot 36 or Lot 37 of Luxol Fast Blue MBS dye was used therein."

Interrogatory 37 is as follows:

> "Describe in detail the 'secret tests' made by plaintiff and referred to in plaintiff's answer to defendant's interrogatory No. 14, and state what the results of said 'secret tests' were."

Hartley objected to such interrogatories. The objections were overruled, but no formal order has as yet been entered by the district court. It is conceded that such interrogatories if answered by Hartley would presumably disclose the secret formula and test procedures belonging to Formulabs.

The district court was fully aware of the existence of the license agreement between Hartley and Formulabs. The record is likewise clear that under statements made by the district judge Hartley must disclose the secret formula and secret test procedures or be faced with a dismissal of

its suit for damages against du Pont. Among other statements made by the district judge to counsel for Hartley in connection with various discovery hearings are the following: "You can talk all you want to, but if you go to trial in this case you are going to have to submit your formula. Now, I don't care what it does or anything else to your contractual rights." "I told you before and I meant it, that you are either going to divulge your formula or out the case goes."

On February 5, 1958, Formulabs moved the district court to intervene in the pending action between Hartley and du Pont on the ground that the property affected belonged to it and that its right of ownership would be seriously injured and destroyed by disclosure of the trade secret. Attached to the motion was the proposed intervenor's cross complaint. Attached to the cross complaint was a copy of the license agreement between Formulabs and Hartley. In the cross complaint it is alleged that the secret formula and the secret test procedures are of great value and disclosure of them would do great and irreparable damage to Formulab's business. The cross complaint prayed that Hartley be enjoined from disclosing such trade secrets. After hearing, the district court entered a final judgment, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, denying Formulabs' petition for intervention.

The district court ordered there be no disclosure of any secret formula or test procedures by Hartley to du Pont pending determination of this appeal.

The sole issue on this appeal is whether the district court erred in denying Formulabs' motion to intervene. The resolution of that issue in turn depends upon the construc-

tion to be given to the provisions of the pertinent provisions of Rule 24, Federal Rules of Civil Procedure.[2] Section (a) of this rule deals with intervention of right. Section (b) of the rule deals with permissive intervention. Since appellant concedes that intervention was not sought under this section, we will not extend this opinion by quoting the provisions thereof. Section (c) of the rule deals with procedure. Since no problem of procedure is involved, we will not quote the provisions of section (c).

The issue before us is further narrowed by Formulabs' concession that unless the intervention sought was a matter of right under Rule 24(a) necessary grounds of jurisdiction to order intervention were lacking, and the order denying intervention was not an appealable order. We will, therefore, return to a discussion of Rule 24(a). Rule 24(a) states that upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene. Formulabs makes no contention under this subsection. Section (a)(2) provides for the right of intervention "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Formulabs makes no contention under this section. Formu-

[2]Rule 24 of the Federal Rules of Civil Procedure provides:
"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." As amended Dec. 27, 1946, eff. March 19, 1948.

labs rests its entire right to intervene under section (a)(3) of the rule, which reads: "(3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

Rule 24(a)(3) was amended December 27, 1946, effective March 19, 1948 [italics indicate added matter]: "(3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property *which is* in the custody *or subject to the control or disposition of* the court or an officer thereof."

We have been unable to find any controlling decision which has interpreted or construed this amended subsection.

Moore's Federal Practice, Volume 4, page 58 states: "The 1946 amendment to Rule 24(a)(3) clarified the question of court control. Under the amendment, property need not be actually in the custody of the court or an officer thereof if it is 'subject to the control or disposition' of the court."

It must be borne in mind that the issue of the propriety of the orders to disclose which the district court has or intends to make is not directly involved in this appeal. Hence we will not comment on that subject or discuss the decisions on that subject which appear in the briefs. The issue before us is whether Formulabs had a right to intervene under Rule 24(a)(3). If so, intervention is a matter of right. *State of Oklahoma v. State of Texas, United States Intervener*, (1922), 258 U.S. 574; *Krippendorf v. Hyde*, 110 U.S. 276.

The law appears to be well settled that if an applicant seeks to intervene under the provisions of Rule 24(a)(2)

the intervenor must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment, Kelly v. Summers, 210 F. 2d 665 (10th Cir., 1954), and that the requirement in 24(a)(2) that a party seeking to intervene must be "bound by" the judgment in the main action has been held to mean that such judgment must be *res adjudicata* as to such party. Sutphen Estates v. United States, 342 U.S. 19 (1951).

Du Pont and Hartley contend on this appeal that the requirements to intervene under Rule 24(a)(2) are applicable to intervene under the provisions of Rule 24(a)(3). They cite in support of their position Dowdy v. Hawfield, 189 F. 2d 637 (C.A. D.C., decided March 1, 1951), certiorari denied 342 U.S. 830. In that case the probate court entered its decree admitting to probate a last will and testament after trial by jury of the issues raised by certain parties wherein they charged the will was procured by fraud and undue influence. The issues were determined against such parties, and the order admitting the will to probate was affirmed by the circuit court, and a writ of certiorari to the Supreme Court was denied. Later the same parties filed a motion to intervene and stay the probate proceedings. Such motions were denied by the district court, and on appeal such order was affirmed, the court stating at page 638: "The appellants' interest in the estate was determined to be nothing in the former contest of the issues which are also presented in this case." It is clear that in the Dowdy case those seeking to intervene had no interest in or property rights to be protected in the probate proceedings. The factual situation is entirely different from the instant case. The opinion contains no analysis of Rule 24(a)(3), and the court was in no manner

required to pass upon the issue which is involved in this appeal.

Appellees have also called our attention to Pure Oil Co. v. Ross, 170 F. 2d 651, 7th Cir., decided November 17, 1948. This case involved an interpleader action by the plaintiff to determine a conflict in claims to money in its possession. The defendants counterclaimed. The money in the possession of the plaintiff was deposited with the court. One Schiff petitioned to intervene, claiming a part of the money. The order denying intervention was reversed by the circuit court. In its opinion the court stated, at page 653:

> "Rule 24(a)(3), Federal Rules of Civil Procedure, 28 U.S.C.A., permits anyone upon timely application to intervene in an action as a matter of right when the applicant is so situated as to be adversely affected by a distribution of property in the custody of the court or of an officer thereof, and the law is well settled, that to authorize an intervention, the intervenor must have an interest in the subject matter of the litigation of such a nature that he will gain or lose by the direct legal operation of the judgment."

The opinion contains no analysis of Rule 24(a)(3), and the facts are so different from the situation in the instant case that we derive no help from that decision in solving the problem before us.

The provision contained in Rule 24(a)(2) is entirely different than the language contained in 24(a)(3). Under 24(a)(2) it must appear that the applicant to intervene is or may be bound by the judgment in the main action. There is no such requirement contained in the provisions of Rule 24(a)(3). Under its plain language any person has the right to intervene if he is so situated as to be ad-

versely affected by a distribution or other disposition of the property which is in the custody or subject to the control or disposition of the court. In our view, Formulabs is so situated. Admittedly it is the owner of the secret formula and secret testing procedures. They are being used by Hartley under a license agreement which forbids disclosure by Hartley. Admittedly Hartley has knowledge of the secret formula and the secret testing procedures. It is a party to the main action pending in the district court. It is subject to the jurisdiction of that court. Under such circumstances, the secret formula and secret testing procedures are subject to the control or disposition of the court. There can be no question that Formulabs will be adversely affected by an order of the court requiring publication of these trade secrets. As stated in Cincinnati Bell Foundry Co. v. Dodds (1887), 19 Weekly Law Bulletin, 10 Ohio Reprint 154:

> "The property in a trade secret is the power to make use of it to the exclusion of the world. If the world knows the process then the property disappears. There can be no property in a process, and no right of protection if knowledge of it is common to the world."

The fact that Formulabs may have the right to seek damages or an injunction against Hartley in the state court is in our view a completely inadequate remedy.

We hold that under the plain language of Rule 24(a)(3) Formulabs had a right to intervene in the main action, and that the district court erred in denying its application.

The order of the district court denying intervention is reversed.

(Endorsed) Opinion Filed Feb. 15, 1960.

Frank H. Schmid, Clerk.

APPENDIX B.

Judgment.

United States Court of Appeals for the Ninth District.

Formulabs, Inc., Appellant, vs. Hartley Pen Company and E. I. du Pont de Nemours & Company, Appellees. No. 16,140.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against the Appellees.

IT IS FURTHER ORDERED and adjudged by this Court that the Appellant recover against the Appellees for its costs herein expended and have execution therefor.

(Endorsed) Filed and Entered: February 15, 1960; FRANK H. SCHMID, Clerk.

APPENDIX C.

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Friday, April 8, 1960.

Before: BARNES and JERTBERG, Circuit Judges, and JAMESON, District Judge.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellee Hartley Pen Company, filed March 16, 1960, and within time allowed therefor by rule of Court for a rehearing of the above cause, be, and hereby is denied.

APPENDIX D.

F. R. C. P., Rule 24, Intervention:

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof. As amended Dec. 27, 1946, effective March 19, 1948.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * As amended Dec. 27, 1946, effective March 19, 1948.

"(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or

an officer, agency or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

As amended Dec. 29, 1948, effective Oct. 20, 1949."

F. R. C. P., Rule 30, Depositions Upon Oral Examination.

"(b) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, enmbarrassment, or oppression.

Rule 34: DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING. Upon motion of any party showing good cause therefor and upon notice to all other

parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. As amended Dec. 27, 1946, effectiye March 19, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

HARTLEY PEN COMPANY,

Petitioner,

vs.

FORMULABS, INC., and E. I. DU PONT DE NEMOURS & COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Formulabs, Inc., respondent, respectfully opposes the granting of the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by Hartley Pen Company.

Opinions Below.

The opinion of the Court of Appeals is set forth in the petition (Pet. App. A, pp. 1-9) and is reported at 275 F. 2d 52, 124 U. S. P. Q. 398.

The District Court wrote no opinion, its order denying the petition for intervention being found at [R. 236].

The Question Presented.

Petitioner confuses the matter when it says:

> "The questions presented cannot be adequately epitomized because of the multiple phases thereof, the many proceedings and voluminous record involved and the unprecedented manner in which intervention was obtained in this case." (Pet. p. 2).

There can be no doubt but that petitioner conceives this to be the case, however, for its "Index" (Pet. pp. 2, 3, 4 and 5) sets forth seven (7) questions, eighteen (18) additional questions being set forth in the petition at pages 6, 34, 35, 36, 37 and 39.

It is the position of the respondent that there is but a single question involved which may be simply stated as follows:

> Does F. R. C. P. 24 (a)(3) give to one not a party to an action pending in a United States District Court the right to intervene for the purpose of asserting an admitted proprietary right to prevent the destruction of its property under the order of the Court?

The Court of Appeals accurately assessed the matter and said:

> "The sole issue on this appeal is whether the district court erred in denying Formulabs' motion to intervene. The resolution of that issue in turn depends upon the construction to be given to the provisions of the pertinent provisions of Rule 24, Federal Rules of Civil Procedure." (Pet. App. A, pp. 4, 5).

Petitioner has at times agreed and said:

"The sole issue on the appeal was whether Formulabs had established the right to intervene, as a matter of right, under Rule 24(a)(3), F. R. C. P." (Pet. p. 6).

Statement of the Case.

Respondent accepts the statement of the facts as set forth by the Court of Appeals (Pet. App. A, pp. 1-6).

It should be added, however, that in the District Court there was no trial, no findings of fact, no conclusions of law, and no ruling except as set forth in the Order Denying Petition for Intervention [R. 236]. The attention of the District Court focused upon the existence or non-existence of a right as determined by the meaning of F. R. C. P. 24(a)(3). The decision of the Court of Appeals was similarly directed to that issue.

Respondent's Position.

It is the position of the respondent that:

1. F. R. C. P. 24(a)(3), as amended effective March 19, 1948, clearly permits intervention by an applicant so situated as to be adversely affected by the disposition of property subject to the control of the court;
2. The decision of the Court of Appeals for the Ninth Circuit
   (a) is not in conflict with the decision of another Court of Appeals on the same matter;
   (b) is not in conflict with applicable state or territorial law;
   (c) is not in conflict with applicable decisions of this court; and

(d) has not departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision.

3. The decision of the Court of Appeals for the Ninth Circuit has decided an important question of federal law but its decision clearly correctly interprets the plain language of F. R. C. P. 24(a)(3).

4. To deny the right to intervene to protect one's property from destruction under the processes of the Court is to deny due process of law.

5. The petition fails to present any special or important reasons justifying the consideration of this Court.

ARGUMENT.

Point 1.

Federal Rules of Civil Procedure, Section 24(a)(3) as Amended, Effective March 19, 1948, Clearly Permits Intervention by an Applicant so Situated as to Be Adversely Affected by the Disposition of Property Subject to the Control of the Court.

By amendment effective March 19, 1948, F. R. C. P. 24(a)(3) was altered by the inclusion of the words appearing in italics in the following quotation of the rule:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other dis-

position of property *which is* in the custody *or subject to the control or disposition* of the court or an officer thereof."

Moore's Federal Practice, Vol. 4, p. 58, says:

"The 1946 amendment to Rule 24(a)(3) clarified the question of court control. Under the amendment, property need not be actually in the custody of the court or an officer thereof if it is 'subject to the control or disposition' of the court."

The petitioner (See Pet. p. 2), the Court of Appeals (See Pet. App. A, p. 6), and this respondent are all in agreement that there appears to be no controlling decision which has interpreted or construed the amended subsection F. R. C. P. 24(a)(3).

The property to be protected in this case comprises a trade secret and no contention has been made that such a secret is not as entitled to the protection of the law as other property.

Judge Taft, later Chief Justice of this Court, in *Cincinnati Bell Foundry Co. v. Dodds* (1887), 19 Weekly Law Bulletin, 10 Ohio Dec. Reprint 154, stated with clarity the concept of property in a trade secret in the following words:

"The property in a trade secret is the power to make use of it to the exclusion of the world. If the world knows the process then the property disappears. There can be no property in a process, and no right of protection if knowledge of it is common to the world."

Respondent Formulabs holds a proprietary interest in the trade secret in question which had been disclosed in confidence to the petitioner Hartley. The District Court

by its order to Hartley to disclose this trade secret to du Pont, a third person, was exercising a control and authority over that property in violation of Formulabs' right to have the secret remain inviolate. The District Court recognized that the formula was in its control and stated:

> "The Court: You (Hartley) are in this court with that formula." (Parenthetical matter added) [R. 273].

Disclosure by the order of the District Court would have been to du Pont, to its agents, to its experts, to the jury, to all present in the court room at the trial, to the record, to the public in general. There were no protective restrictions and it is difficult to see how satisfactory protection could have been provided in a jury trial involving experts. Compliance with the court order would have effected the loss of the secrecy of the Formulabs' trade secret. This was recognized by the District Court judge who said:

> "The Court: Well, I think the few cases I have read indicate the only way to keep anything is to keep it to yourself and if you tell it to a second person that information travels very fast." [R. 369].

Petitioner Formulabs bases its right to intervene upon the express provisions of part (3) of Rule 24(a), for it is so situated that it will be "adversely affected by a distribution or other disposition of property which is . . . subject to the control or disposition of the court." It was contended below that intervention was not available, for petitioner's property would not be disposed of by the *judgment* of the court but instead by interlocutory order.

In Rule 24 part (2) it is expressly provided that the applicant is entitled to intervene when he is inadequately

represented and "may be bound by a judgment." In part (3), however, no mention is made of a "judgment." Had it been intended that the property to be protected must be disposed of by a judgment, rather than by an interlocutory order, why was no reference made to a judgment in part (3)? It is clear that disclosure and publication of a trade secret under an interlocutory order can destroy the secrecy fully as effectively as publication under a judgment.

The reference to "judgment" in part (2) and the omission of any reference to "judgment" in adjacent part (3), leads to the conclusion that part (3) is in no way dependent upon a "judgment."

Giving to F. R. C. P. 24(a)(3) the interpretation clear from its plain language, Formulabs had the right to intervene.

Point 2.

The Decision of the Court of Appeals for the Ninth Circuit:

(a) Is Not in Conflict With the Decision of Another Court of Appeals on the Same Matter;

(b) Is Not in Conflict With Applicable State or Territorial Law;

(c) Is Not in Conflict With Applicable Decisions of This Court;

(d) Has Not Departed From the Accepted and Usual Course of Judicial Proceedings, nor Sanctioned Such a Departure by a Lower Court, as to Call for the Exercise of This Court's Supervision.

The present case is believed to be one of first impression with regard to F. R. C. P. 24(a)(3). There are earlier decisions relating to the right to intervene prior to

the Federal Rules of Civil Procedure which support the Formulabs position and there are other decisions construing subsections other than 24(a)(3). The facts alleged in the heading, however, are true to the best of our knowledge and belief.

Contrary to the allegations of the petitioner, there are no prior decisions with which the decision of the Court of Appeals below conflicts.

In the petition at page 26 petitioner alleges that the decision of the Court of Appeals below was contrary to certain listed cases. It is worth while to discuss these cases briefly to illustrate how far from the present case they really are.

Pure Oil Co. v. Ross (C. A. 7, 1948), 170 F. 2d 651.

This was an action of interpleader brought to determine conflicting claims of defendants to a sum of money in possession of the plaintiff wherein the defendants counterclaimed and one Schiff filed a petition to intervene as a party defendant which petition was denied by the lower court and from which denial Schiff appealed.

It was found that Schiff was in fact interested in the subject matter involved in the case and his claim related to no other subject matter.

Here was no question of right to intervene to protect property not the subject matter of litigation. Clearly the court could not pass upon that question.

With respect to this case the Court of Appeals below stated:

> "The opinion contains no analysis of Rule 24(a)(3), and the facts are so different from the situation in

the instant case that we derive no help from that decision in solving the problem before us." (Pet. App. A, p. 8).

Kaufman v. Societe International (C. A. D. C., 1951), 188 F. 2d 1017.

In an action by the Societe against J. N. McGrath, Attorney General and successor to the Alien Property Custodian, one Kaufman and another undertook to intervene upon the grounds that they were stockholders of the corporation owning the property involved. Intervention was denied and the would-be intervenors appealed.

The subject matter in which the petitioners for intervention were interested and in which they claimed an interest was the *res* involved in the action. The Court found that as stockholders they had no interest in that subject matter. In fact, they had no interest in any subject matter being disposed of by the Court.

Clearly this case cannot be controlling.

Dowdy v. Hawfield (C. A. D. C., 1951), 189 F. 2d 637, certiorari denied 342 U. S. 830.

It had been determined in an earlier case that the petitioner for intervention had no interest in the estate in the probate of which he sought to intervene. It was not a question of whether the petitioner's property was being adversely affected by the judgment or by an interlocutory order. She simply had no property rights to be protected and it had been so determined previously. The Court said:

"The appellants' interest in the estate was determined to be nothing in the former contest of the issues which are also presented in this case."

Relative to this *Dowdy* case, the Court of Appeals below said:

> "The factual situation is entirely different from the instant case. The opinion contains no analysis of Rule 24(a)(3), and the court was in no manner required to pass upon the issue which is involved in this appeal." (Pet. App. A, pp. 7, 8).

Kelley v. Summers (C. A. 10, 1954), 210 F. 2d 665.

Here a compensation insurer sought to intervene against a third party tort-feasor, having made payment, and it was held that the insurer had a sufficient interest in the subject matter of the litigation to enable it to intervene.

Here was no third party seeking to intervene to protect property not the subject of litigation and adversely affected by the order of the court. The interest of the would-be intervenor was in the very subject of the litigation.

Peckham v. Ronrico Corp. (C. A. 1, 1954), 211 F. 2d 727.

In an action based upon alleged fraudulent concealment of assets of a judgment debtor a petition to intervene was filed. The Court of Appeals held that intervention should be granted as the petitioner would be adversely affected by the disposition of shares pursuant to this judgment. Obviously this case could be no authority for a set of facts such as are present in the instant case.

The contention of the petitioner that the Court of Appeals below decided adversely to previous holdings does not stand up under careful consideration.

On page 38 of the petition, the case of *Krippendorf v. Hyde* (1884), 110 U. S. 276, 28 L. Ed. 145, was cited by Petitioner as supporting the contention that the "applicant for intervention must have an interest in the subject matter of the main action."

Respondent also views this decision favorably, but that it could possibly be interpretative of F. R. C. P. 24(a)(3) as amended in 1948, is not to be taken seriously.

Krippendorf v. Hyde recognized the inherent right of the possessor of proprietary interests in property to be heard in protection of that property, and the fundamental rights as there set forth justify the interpretation of 24(a)(3) as contended for by respondent.

In that case an action was brought to recover an amount alleged to be due for goods and merchandise sold. A writ of attachment was issued. The appellant, claiming ownership of the goods, was added as a party to the action but his name was later stricken without prejudice. Judgment was subsequently rendered in favor of the plaintiff and the attached property was ordered sold. The appellant, not a party to the action, thereupon filed a bill naming all parties to the action as defendants including the Marshal. The grounds of the decree of the Circuit Court below was that the appellant had a plain and adequate remedy at law. This Court said in part:

> "The principle is that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court and thereby prevent injustice or an inequitable advantage under *mesne* or final process, is not an original suit but ancillary and dependent, supplementary merely to an original suit out of which it had arisen and is maintained

without reference to the citizenship or residence of the parties.

* * * * * * *

"No one, even in equity, is entitled to be made or to become a party to the suit unless he has an interest in its object (Calvert, Parties, 13); yet it is the common practice of the courts to permit strangers to the litigation, claiming an interest in its subject-matter, to intervene on their own behalf to assert their titles. 'When any person . . . . claims to be entitled to an estate or other property sequestered whether by mortgage or judgment, lease or otherwise, or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any and what interest in the property sequestered. This inquiry is called an examination *pro interesse suo*. . . .' The grounds of this procedure are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court.

* * * * * * *

". . . So that, unless he is allowed to intervene by his present bill to stay the distribution of the fund, which, by the demurrer, is admitted to be his own, the anomaly will be presented, in judicial proceedings, of an award, dividing property among claimants, from which the only person excluded is the one whose sole and paramount title is confessed; and he will be compelled to stand idly by to witness the dis-

sipation of his property into many unknown hands, by a court, to whose jurisdiction he has submitted himself from the beginning, and which now remits him to an action for damages against its own officer who has simply acted under its order."

The fundamental rights recognized in 1884 in that case can and should be applied today in the interpretation of F. R. C. P. 24(a)(3).

At page 48, paragraph 10, the petition for certiorari alleges that the Court of Appeals interpretation of F. R. C. P. 24(a)(3) enlarges or alters Federal jurisdiction and cites in support thereof the following:

2 Barron & Holtzoff, Section 593, p. 202;

Bantel v. McGrath, 215 F. 2d 297.

Such is not the case and in fact Federal jurisdiction was recognized long prior to the Federal Rules of Civil Procedure as is set forth in the discussion above of the *Krippendorf* case.

2 Barron & Holtzoff, Section 593, p. 202.

In this citation relied upon by petitioner we find the following:

"Rule 24 does not enlarge federal jurisdiction."

As indicated, there is no reason to contest this point. *Bantel v. McGrath* (C. A. 10, 1954), 215 F. 2d 297.

This case, relied upon by petitioner, was an action by the Attorney-General under the Trading with the Enemy Act to enforce a vesting order for the possession of property belonging to German Nationals who were beneficiaries in a trust. The District Court denied the right of the German Nationals to intervene and they appealed.

The Court of Appeals held the case was mooted, for the property had been turned over under the authority of Section 17 of the Act, and any further proceeding to determine rights would be under "Section 9(2) of the Act giving non-enemy owners a right to maintain a suit for recovery of seized property." Clearly this special set of facts and circumstances lend no aid to the interpretation of F. R. C. P. 24(a)(3) when applied to the present case.

The decisions relied upon by the petitioner do not support a conclusion contrary to the averments of the heading of this point.

As previously stated, no prior decision directly in point has been found by any party. However, it is felt that the interpretation for which respondent contends finds some precedent in spirit, at least, in the cases including the following:

Kozak v. Wells (C. A. 8, Apr. 26, 1960), 3 F. R. Serv. 2d 24a.2, Case 1, ... F. 2d .....;

Ford Motor Company v. Bisanz Bros. Inc. (C. A. 8, 1957), 249 F. 2d 22, 2 F. R. Serv. 24a.2;

Clark et al. v. Sandusky, et al. (C. A. 7, 1953), 205 F. 2d 915;

Mack et al. v. Passaic Nat'l Bank & Trust Co. (C. A. 3, 1945), 150 F. 2d 474;

Wolpe et al. v. Poretsky, et al. (C. A. D. C. 1944), 144 F. 2d 505.

Point 3.

The Decision of the Court of Appeals for Ninth Circuit Has Decided an Important Question of Federal Law but Its Decision Clearly Correctly Interprets Federal Rule(s) of Civil Procedure 24(a)(3).

Rule 19(1)(b) of this Court sets forth that a sound reason for the court's taking jurisdiction of the question, despite the absence of the various grounds set forth under the preceding point of this brief, comprises the presence of an important question "which should be settled by this Court."

It is recognized that the question involved is important, but it is also believed that the decision of the Court of Appeals is so clearly correct, and consistent with the plain language of the rule involved, that there is no sound reason that the time of this Court should be taken to reinforce that decision.

As interpreted by the Court of Appeals, F. R. C. P. 24(a)(3) provides the following rights and advantages:

First, a direct remedy is provided to the owner of a proprietary right being adversely disposed of by the processes of a court;

Second, it enables the lower court to give complete relief;

Third, multiplicity of actions and circuity are avoided;

Fourth, an adequate remedy is provided where no other exists, as in the present case in which a state court has no right to enjoin a federal court, as under the present set of facts; and

Fifth, it carries out the purpose of the Federal Rules to promote justice and to give adequate relief.

Point 4.

To Deny the Right to Intervene to Protect One's Property From Destruction by the Processes of the Court Is to Deny Due Process of Law.

Formulabs raised this issue of the violation of its Constitutional rights through denial of due process of law in the District Court [R. 211-228]. The issue was also raised before the Court of Appeals (Appellant's Br. pp. 18-21).

In the District Court before Formulabs filed its petition for intervention, it was the original position of petitioner Hartley that the unauthorized disclosure of the Formulabs trade secret would be taking property without due process of law.

> "Mr. Falcone: . . . and I think you would be taking Formulabs' property without due process." [R. 277].

> "Mr. Falcone: May I ask the court what, if anything, it (the court) proposes to do regarding Formulabs and our obligation to Formulabs? Do you think Formulabs should be brought in and given an opportunity to protect its rights?" (Parenthetical matter added.) [R. 298].

> "Mr. Falcone: What I am trying to say is that I want to advise Formulabs of the court's order. Now, they may want to bring in their attorneys and I suppose they would want to do something about it.
>
> ". . . Formulabs isn't here, they are not represented and I think seriously this is taking property without due process because they haven't had a

chance to do anything about it. I want to advise them of the court's order.

"The Court: The only thing I want to say, gentlemen, is that if it is not furnished, I will never try this lawsuit until it is furnished." [R. 309-310].

There can be no reasonable difference of opinion concerning the following:

1. A trade secret is entitled to the protection of the law.
2. Public disclosure of a trade secret destroys the secret and the property therein.
3. The secret of a trade secret is destroyed by disclosure under court order relating to discovery just as completely as by a disclosure under a judgment.
4. A trade secret in the possession of a party is under the control of the court, and the court exercises that control when it orders the secret disclosed.
5. To destroy property by order of court without giving to one having a proprietary interest therein the opportunity to be heard is to violate the due process law provision of the Constitution.

Amendment Fourteen of the United States Constitution at Section 1 provides in part as follows:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

The Fifth Amendment contains the prohibition against the Federal Government as follows:

"No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

". . . the legal import of the phrase 'due process of law' is the same in both amendments."

French v. Barber Asphalt Paving Co. (1901), 181 U. S. 324, 329, 45 L. Ed. 879, 884.

The Constitution of the State of California in Article I, Section 13, provides in part:

"No person shall . . . be deprived of life, liberty, or property without due process of law."

Mr. Justice Field in *Hagar v. Reclamation District No.* 108 (1883), 111 U. S. 701, 28 L. Ed. 569, page 572, said:

". . . The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Formulabs should not be deprived of its property under the law without first being given the right to protect it.

"A hearing or an opportunity to be heard is an essential element of due process of law."

16A C. J. S., Constitutional Law, Sec. 622;

Ochoa v. Hernandez y Morales (Porto Rico), 33 S. Ct. 1033, 1038, 230 U. S. 139, 57 L. Ed. 1427.

Due process requires that before one can be deprived of property, notice and opportunity for hearing before some tribunal authorized to determine the question shall be had.

Hill v. Badeljy, 107 Cal. App. 598, 290 Pac. 637, 639;

Suckow v. Board of Medical Examiners, 182 Cal. 247, 187 Pac. 965, 966.

As was said in the dissenting opinion by Mr. Justice Carter in *Simpson v. City of Los Angeles,* 40 Cal. 2d 271, 253 P. 2d 464, 473,

> ". . . While it is impossible to define with precision 'due process of law' it means, broadly speaking, that before a man's property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard. . . ."

It would be presumptuous here to try to tell this Court what "due process of law" comprises. A careful search has failed to disclose an earlier case in which there has been an effort to prevent the disclosure of a trade secret by the assertion of the right to due process of law. Perhaps in view of the unusual character of this case that is not too surprising.

However, if we accept the statements numbered 1 to 5 above, it is clear that the order of the District Court denying intervention [R. 236] violated Formulabs' right to due process. It was admitted the trade secret was secret and that Formulabs had a proprietary interest therein. It is clear that no one has any right to that secret in the absence of the consent of Formulabs. Hartley received the secret as a confidential disclosure and its undertaking not to disclose was evidenced by its contract attached to intervenor's proposed cross-complaint [R. 78-81]. The order of the District Court to Hartley to disclose that secret was a violation of Formulabs' proprietary rights and a direction to Hartley to breach its obligation under the contract. For the court then to deny the right of Formulabs to be heard in protest of this invasion of its rights by refusing intervention [R. 236]

would, it is respectfully represented, constitute a simple and clear denial of due process and a violation of Formulabs' Constitutional rights.

Point 5.

The Petition Fails to Present Any Special or Important Reasons Justifying the Consideration of This Court.

It is the view of respondent that there is but a single principal question involved and as discussed above. No denial is made that it is important but it is denied that there exists any special or important reasons justifying consideration by this Court.

On its face, F. R. C. P. 24(a)(3) provides the relief which Formulabs sought in the District Court. The Court of Appeals for the Ninth Circuit stated respondent's position with clarity and in the following words:

> ". . . Under its (F.R.C.P. 24(a)(3)) plain language any person has the right to intervene if he is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court. In our view Formulabs is so situated. Admittedly it is the owner of the secret formula and secret testing procedures. They are being used by Hartley under a license agreement which forbids disclosure by Hartley. Admittedly Hartley has knowledge of the secret formula and the secret testing procedures. It is a party to the main action pending in the district court. It is subject to the jurisdiction of that court. Under said circumstances, the secret formula and the secret testing procedures are subject to the control or disposition of the court.

There can be no question that Formulabs will be adversely affected by an order of the court requiring publication of these trade secrets. As stated in *Cincinnati Bell Foundry Co. v. Dodds* (1887), 19 Weekly Law Bulletin, 10 Ohio Reprint 154:

> 'The property in a trade secret is the power to make use of it to the exclusion of the world. If the world knows the process then the property disappears. There can be no property in a process, and no right of protection if knowledge of it is common to the world.'

"The fact that Formulabs may have the right to seek damages or an injunction against Hartley in the state court is in our view a completely inadequate remedy.

"We hold that under the plain language of Rule 24(a)(3) Formulabs had a right to intervene in the main action, and the district court erred in denying its application."

The rule is clear on its face. It has been interpreted by the Court of Appeals in accordance with its clear meaning. No special or important reason is recognized for the intervention of this tribunal.

Conclusion.

The petition for writ of certiorari filed on behalf of Hartley Pen Company presents no meritorious reasons justifying its grant. The denial of the petition is respectfully urged.

Respectfully submitted,

WILLIAM DOUGLAS SELLERS,

Attorney for Respondent Formulabs, Inc.

Dated: June 3, 1960.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 926

HARTLEY PEN COMPANY,

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vs.

FORMULABS, INC., and E. I. DU PONT DE NEMOURS & COMPANY,

Respondents.

Petitioner's Brief in Reply to Respondent Formulabs' Brief in Opposition to Petition for Writ of Certiorari.

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United States Constitution, Fifth Amendment 9
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TEXTBOOKS

2 Barron & Holtzoff, Federal Practice and Procedure, Sec. 603, p. 233, n. 99 14
4 Moore's Federal Practice, Sec. 24.14, p. 110, n. 1 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 926.

HARTLEY PEN COMPANY,

Petitioner,

vs.

FORMULABS, INC., and E. I. DU PONT DE NEMOURS & COMPANY,

Respondents.

Petitioner's Brief in Reply to Respondent Formulabs' Brief in Opposition to Petition for Writ of Certiorari.

Preface.

A copy of respondent Formulabs' (hereinafter referred to as respondent) brief in opposition to petitioner's petition for writ of certiorari in the above proceeding was received by mail by petitioner's attorneys on Saturday, June 4, 1960, actually first seen by them on Monday, June 6, 1960 and election day on June 7, prevented preparation of the reply until June 8, 1960.

Petitioner respectfully requests this Court's consideration of this reply brief under this Court's Rule 24, paragraph 4.

This case, and the issues involved on this appeal, are so important that respondent has seriously contended that if it were not permitted to intervene, as a matter of right, under Rule 24(a)(3), as it has been permitted to intervene by the Court of Appeals, it would be denied due process; on the other hand, petitioner most seriously contends that it stands to have its meritorious cause of action jeopardized or destroyed if respondent's intervention is permitted to stand, under the circumstances and upon the record in this case, an intervention which conflicts with a long established line of decisions of the various Courts of Appeals and this Court and which constitutes a disregard of the provisions of Rule 24, considered as a whole, and a marked departure from the accepted and usual course of judicial proceedings.

Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

Preface.

Respondent did not answer petitioner's petition for writ of certiorari.

Its brief contains general statements, most, if not all, of which were its mere *ipse dixit*. It did not cite authorities in its support (except, impliedly, of course, the decision of the Court of Appeals).

Respondent did not reply to petitioner's serious contentions as to the issues and questions involved, generally including the contract between them, respondent's intervention proceedings and the construction of Rule 24, and more particularly including respondent's right to intervene *upon the record before the Court*, the construction of Rule 24, particularly 24(a)(3), and the necessary

inclusion of Rule 24(c); that the discovery orders made by the District Court did not come within Rule 24(a)(3); that the disclosure orders did not come within the said contract; that respondent's cross-complaint did not state a cause of action or any cause for intervention; that in reversing the District Court's order denying intervention and thereby allowing intervention, *upon the record before it*, the Court of Appeals necessarily construed the contract between petitioner and respondent and determined its effect without affording petitioner the right to properly and fully litigate it upon its merits; that in permitting respondent to intervene it was opening the door to permitting it to thereby litigate a completely separate controversy between itself and petitioner alone, thereby conflicting with the various decisions of this Court and the various Courts of Appeals, cited and discussed by petitioner.

A succinct consideration of respondent's opposing brief follows:

1. Its "Questions Presented" (pp. 2-3).

Respondent stated that "petitioner confuses the matter" because although only one issue was involved (*i.e.*, respondent's right to intervene, as of right, under Rule 24(a)(3), *under the record in this case*), petitioner stated that it was difficult for it to adequately epitomize the questions because of their multiple and complex phases, the voluminous record involved and "the *unprecedented* manner in which intervention was obtained in this case."

The significance of this statement is not clear to petitioner.

2. Its "Statement of the Case" (p. 3).

It stated that it accepted the Court of Appeals' statement of facts.

3. Respondent's Position (pp. 3-4).

The substance of its position, stated in five paragraphs, was that Rule 24(a)(3) permitted intervention when the applicant is "so situated as to be adversely affected by the disposition of property subject to the control of the Court," which begged the various questions involved (and which were listed and discussed by petitioner); that the decision of the Court of Appeals was correct; that although it decided "an important question of federal law," it correctly interpreted Rule 24(a)(3); that to deny the right to intervene to protect one's property "from destruction under the processes of the court is to deny due process of law"; that petitioner failed to present any special or important reasons justifying the consideration of this Court.

4. Its "Argument" (pp. 4-21).

It contained five points:

POINT 1 (pp. 4-7).

The substance of its contentions hereunder was that it "holds a proprietary interest in the trade secret in question" (p. 5); that compliance with the disclosure orders "would have effected the loss of the secrecy of the . . . trade secret" (p. 6), for which respondent had a right to intervene under Rule 24(a)(3) which, unlike Rule 24(a)(2), did not mention a "judgment."

Respondent's position was, in effect, that it had the right to intervene *ipso facto*, by virtue only of its interest

in the said trade secret regardless of all other established requirements for intervention and regardless of the provisions of Rule 24; extended, its contentions were, that if necessary Rule 24(a)(3) should be so construed as to permit it to intervene upon the record in this case.

Respondent completely evaded considering petitioner's substantial argument regarding its rights in the trade secret covered by the contract between them (as well as its rights to the other formulas and tests which were not at all limited by the contract), its rights in the contract, the limited scope and application of the contract, the fact that the discovery orders were not within the provisions of the contract, the fact that the contract related to only *one* formula, whereas the discovery orders related to several.

It also completely evaded considering petitioner's substantial argument regarding respondent's proceedings to intervene, its motion and unprecedented cross-complaint, which did not state a cause of action or a good claim upon which relief could be granted, which was required, for all interventions, under all parts of Rule 24.

It also completely evaded considering petitioner's substantial argument that Rule 24(c) was an integral part of Rule 24(a) and had to be complied with in order to entitle intervention, in any event, under Rule 24(a)(3). Both respondent and the Court of Appeals disregarded Rule 24(c).

Respondent did not consider or reply to petitioner's argument that Rule 24 was an integral rule, to be construed in context, or to the decisions by the various Courts of Appeals, cited by petitioner, which unequivocally held that under Rule 24(a)(3) the applicant for intervention

must have such an interest in the subject matter of the main action as to gain or lose by the direct legal operation of the judgment.

Respondent stated (p. 6) that it was contended in the District Court that intervention was not available to respondent because petitioner's property would not be disposed of by a judgment but by an interlocutory order. This is not correct. The contentions made in the District Court were fully and correctly stated in petitioner's petition for writ of certiorari (particularly pp. 17-22). The opposition by petitioner, as well as du Pont, to respondent's attempt to intervene, as stated in petitioner's petition, was not only that a judgment was not involved but that the discovery orders did not "dispose" or "distribute" "property" which was "subject to the control or disposition of the Court," within the meaning of Rule 24(a)(3) and further (and *crucially*), that respondent had not brought itself within Rule 24(a)(3), including its failure to comply with Rule 24(c).

POINT 2. (pp. 7-14).

The crux of respondent's contentions hereunder was that the decision of the Court of Appeals was correct. Respondent conceded that this case is "one of first impression with regard to FRCP 24(a)(3)."

Respondent did not consider or reply to petitioner's argument in this regard, or regarding the decisions of the Courts of Appeals, noted *infra*, construing Rule 24(a)(3), and this Court's decision, noted *infra*, as to the scope and basis for intervention, all cited and considered by petitioner in its petition.

Rather than reply to petitioner's petition, including its "Questions Presented" and "Reasons for Granting the

Writ," upon the merits of petitioner's contentions, respondent sought to factually distinguish the following cases, cited and considered by petitioner, and contended that since they were not on a factual parity they were not authoritative. These cases were: *Pure Oil Co. v. Ross* (7th Cir. 1948), 170 F. 2d 651; *Kaufman v. Societe Internationale* (C. A. D. C. 1951), 188 F. 2d 1017; *Dowdy v. Hawfield* (C. A. D. C. 1951), 189 F. 2d 637, cert. den. 324 U. S. 803; *Kelley v. Summers* (10th Cir. 1954), 210 F. 2d 665; *Peckham v. Ronrico Corp.* (1st C. A. 1954), 211 F. 2d 727.

This ignored the fact that the Courts' language in each of the cases unequivocally stated their construction of Rule 24(a)(3), whereas no other case or authority was cited by respondent to support its contrary construction until the Court of Appeals' decision herein.

Respondent similarly sought to factually distinguish this Court's decision in *Krippendorf v. Hyde,* 110 U. S. 76, discussed by respondent (pp. 11-13), evading the fact that the decision held that the applicant for intervention must have the requisite interest in the *subject matter* of the main action.

POINT 3 (p. 15).

Hereunder it conceded that the decision of the Court of Appeals decided an important question of federal law, which under this Court's Rule 19(1)(b) alone constituted "a sound reason for the court's taking jurisdiction of the question," but it claimed that the Court of Appeals correctly construed Rule 24(a)(3).

It stated that, as interpreted by the Court of Appeals, Rule 24(a)(3) provides:

First, a direct remedy to "the owner of a proprietary right being adversely disposed of by the process of the Court."

This patently demonstrates that this is a novel construction allegedly in order to create a new remedy where none existed before. If this be so, it would extend federal jurisdiction, which respondent already conceded was not the effect of Rule 24 (p. 13 of its brief). This implies that such owner previously had no remedy, which is not correct.

Second, that it enables the "lower court to give complete relief."

Third, that it avoids multiplicity and circuity of actions.

The second and third paragraphs clearly demonstrate that such construction of Rule 24(a)(3) would open the door in the main action to any and all controversies, which had no relation to its subject matter or issues or even some of its parties, all contrary to all the decisions of the Courts of Appeals and this Court, holding as noted in petitioner's petition (particularly p. 38) that intervention would not be permitted for the purpose of having adjudicated a controversy solely between the intervenor and one of the parties, nor to enlarge the issues tendered by and arising out of the plaintiff's complaint in the main action and that the scope of intervention was limited to the field of litigation open to the original parties.

Chandler v. Brandtjen, Inc., 296 U. S. 53.

Fourth, that an adequate remedy was provided where none existed before.

No authority was cited for this statement, which is comparable to paragraph First.

Fifth, that it carries out the purpose of the federal rules "to promote justice and to give adequate relief."

Petitioner submits that it is not the purpose of the federal rules to permit indiscriminate intervention or the use of the discovery proceedings to destroy a meritorious cause of action, particularly under the circumstances and record of this case.

It is respondent's position, and the effect of the Court of Appeals' decision, that respondent should be permitted to intervene *ipso facto* by virtue of its interest in the one formula, ignoring petitioner's interest therein and its right to use said interest to assure it the fruits therefrom. Respondent is not seeking to help petitioner (as it is its duty to do, legally and otherwise, by virtue of its contract and the relationship between them), but to destroy its case. This alone is not a rare occurrence in the law. However, to accomplish it by the unprecedented manner of respondent's intervention proceedings, particularly its cross-complaint, all emanating from discovery proceedings in the main action, under the federal rules, which respondent stated were enacted to promote justice, *is* a rare occurrence and one which peculiarly calls for this Court's protection.

POINT 4 (pp. 16-20).

Hereunder respondent contended that to deny the right to intervene to protect property from "destruction by the processes of the Court is to deny due process of law," citing the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 13 of the California Constitution.

Respondent stated (p. 16) that it was "the original position of petitioner" that "the unauthorized disclosure of the . . . trade secret would be taking property without due process of law". This is an incomplete statement. Petitioner's position always was (and is) that there should be no disclosure for many reasons, basically because du Pont had not shown good cause therefor, and also that respondent should be permitted to *properly* participate. There has been no change in petitioner's position. Petitioner's opposition to the intervention has been only in the *way* and for the *purpose* it has been sought on the present record (see Pet. pp. 6, 18 and 32-33).

Respondent stated (p. 17) that "There can be no reasonable difference of opinion" concerning five separate statements made on said page. There is not only a reasonable difference of opinion as to the statements made in paragraphs 3, 4 and 5 thereof; but petitioner has stated in detail the factual and legal reasons, as well as the authorities, contrary thereto.

Hereunder respondent meticulously evaded considering or answering petitioner's sincere argument regarding the contract between them and the effect of the discovery orders upon the contract, particularly as to respondent's rights thereunder and its right to intervene because of it.

Hereunder respondent repeated a portion of its argument before the District Court and ignored the fact that due process was not denied to it. Petitioner contended throughout the District Court's discovery proceedings regarding disclosure orders that respondent should be given the opportunity to *properly* participate. It is petitioner's position, and it submits that it is the fundamental law, that when opportunity is given to participate in accordance with the applicable rules and procedures, then due

process is given. The violation of due process is not in making an order but in making an order without permitting proper participation. Participation must conform with appropriate proceedings.

> "Whatever else may be uncertain about the definition of 'due process', all authorities agree that it inhibits the taking of one man's property and giving it to another *contrary to settled usages and modes of procedures*, and without notice or an opportunity for a hearing."
>
> *O'Choa v. Hernandez*, 230 U. S. 139, 161.

Petitioner submits that respondent did not comply with the requisite procedure generally stated in Rule 24(c). It was given due process when it was permitted to take its intervention proceedings, to argue and submit them for decision and to have the District Court rule upon them. It failed to show it was entitled to intervene.

Due Process does not mean a favorable ruling but an opportunity to obtain a ruling (adverse or favorable).

POINT 5 (pp. 20-21).

Hereunder respondent contended that it could not deny that the question of intervention was important but it nevertheless denied that "there exists any special or important reasons justifying consideration by this Court."

Respondent's position is equivocal and unsubstantial. To justify its conclusion that, although the questions involved are important, there allegedly exists no special or important reasons for this Court to grant certiorari, it stated (p. 21) that Rule 24(a)(3) "is clear on its face. It has been interpreted by the Court of Appeals in accordance with its clear meaning."

This is not true. The construction of Rule 24(a)(3) in this case is not so simple or clear. And as noted in the petition, respondent and the Court of Appeals completely ignored Rule 24(c), which is an essential part of Rule 24(a).

But, further than that, respondent stated (p. 5) "The petitioner (See Pet. p. 2), the Court of Appeals (See Pet. App. A. p. 6), and this respondent are all in agreement that there appears to be no controlling decision which has interpreted or construed the amended subsection FRCP 24(a)(3)."

Respondent also stated (p. 7) "The present case is believed to be one of first impression with regard to FRCP 24(a)(3)." It also stated (p. 14) "As previously stated, no prior decision directly in point has been found by any party." It also stated (p. 19) "A careful search has failed to disclose an earlier case in which there has been an effort to prevent the disclosure of a trade secret by the assertion of the right to due process of law."

Under the circumstances it is submitted that the rule is not so "clear on its face" and does not have such a patently "clear meaning" as contended by respondent and as held by the Court of Appeals.

Further, it is not true that there are no decisions of the Courts of Appeals construing and applying Rule 24(a)(3). As noted, *supra*, petitioner in its petition (pp. 40-43) quoted from the following cases construing and applying Rule 24(a)(3), each of which stated that one of the bases for its application was that the intervenor must have an interest in the subject matter of the litigation of such a nature that it would gain or lose by the direct legal operation of the judgment: (*Pure Oil Co. v. Ross, supra;*

Kaufman v. Societe Internationale, supra; Dowdy v. Hawfield, supra; Kelley v. Summers, supra; Peckham v. Rourico Corp., supra.)

Petitioner's General Reply to Respondent's Brief.

As noted, respondent did not reply to the substantial contentions made by petitioner in its petition, particularly in its "Questions Presented" and "Reasons for Granting the Writ." These included respondent's right to intervene, not academically and as a general abstract proposition but (the only way that this right could or should be determined) *upon the record in this case, i.e.*, its proceedings to intervene.

The sole basis for respondent's intervention, in any event, was the contract between it and petitioner; the only means by which it could intervene was by its motion and cross-complaint.

It did not consider or reply to any of petitioner's contentions regarding the contract, including that respondent did not have exclusive right to the formula, that the discovery orders did not come within the provisions of the contract, that the discovery orders could not and did not violate the contract, that petitioner did not violate the contract because of the discovery orders because it had opposed them consistently and therefore had done neither of the two prohibitions of the contract, *i. e.*, voluntarily disclose or fail to use reasonable precaution against involuntary disclosure; that the contract, in any event, only involved one formula, whereas the disclosure orders involved several and thereby respondent was being permitted to intervene without any basis or right as to the others.

Nor did respondent consider or reply at all to petitioner's serious contentions regarding respondent's means of intervention, *i. e.*, its motion and cross-complaint, *i. e.*, that it not only did not state a good claim or defense, as required by Rule 24(c), but patently showed that it did not state a cause of action or claim *upon which relief could be granted,* which was required.

2 *Barron & Holtzoff*, §603, p. 233, n. 99;
4 *Moore's*, §24.14, p. 110, n. 1;
Schurtz v. Foster & Kleiser (D. C. Cal. 1939), 29 Fed. Supp. 162.

Nor did respondent reply to petitioner's contention that there was no precedence in fact, law, or otherwise, for permitting anyone to intervene for the purpose of requesting any Court to make an order directing a party to ignore a prior order of the same Court directing him to do certain things.

Nor did respondent reply to petitioner's argument that if Rule 24(a)(3) permitted intervention, as respondent contended, and as the Court of Appeals held, there would be no reason for Rule 24(a)(2) since the extremely limited basis for intervention under Rule 24(a)(2) would be included in the unlimited application of Rule 24(a)(3).

Nor did respondent reply to petitioner's argument that by ruling that respondent could intervene on its cross-complaint, the Court of Appeals necessarily held that the cross-complaint stated a good claim and cause of action for intervention, which could only have meant that the Court of Appeals agreed with respondent's contention that the discovery orders would breach the contract between petitioner and respondent, whereas the contract did not en-

compass the same; that in any event, this was a construction of the contract, which was not involved in the main action, a completely separate controversy, thereby determined without a trial upon its merits and without opportunity to petitioner to have the same so determined.

Conclusion.

Although it is obvious that this case is most important to petitioner and du Pont and, tenuously, important to respondent (only as to the discovery orders), the determination of the issue involved in this appeal by the determination of the various questions involved and a construction of Rule 24, as they apply to this case, will also be of general importance.

If the construction by the Court of Appeals stands, it will open the door to indiscriminate interventions and will erase all the substantive and procedural requirements, long established, for intervention in a disciplined and orderly manner.

The effect of the Court of Appeals' decision, as noted in the petition, is that *anyone* having *any* interest in *any* property (which may be involved in an action only for the limited purpose and within the limited scope of discovery proceedings) may intervene and have determined in the main action *any* collateral controversy between it and one or more, but not all, of the parties, and thereby require the trial of multiple issues and multiple cases in one action under the alleged guise of avoiding multiplicity of suits.

This construction, as specifically applied in this case, would result in the use of the federal rules to promote not only an irregularity of proceedings (in fact, inordinate

proceedings), but to procedurally promote injustice. It would permit respondent, which has prospered under its contract with petitioner, to so exclusively use its limited rights under the contract as to exclude petitioner and deprive it of its substantial rights and interests therein and to the use thereof to enforce its meritorious case, which would be jeopardized or destroyed by the means of intervention in a manner not only without precedence, but in violation of all settled substantive and procedural principles.

What if the District Court orders petitioner not to obey its own disclosure orders?

This is not only a possibility but a foreseeable probability, since the Court of Appeals *necessarily* held that respondent, *in seeking precisely that relief*, stated the requisite "good cause upon which relief can be granted."

If so, which order is petitioner to obey? The first order directing disclosure? Or the last directing it not to obey the first? And in either event what is the inevitable result to petitioner? Clearly the dismissal of the main action, which the District Court frequently threatened if disclosure were not made!

Note that if respondent's objective was to protect its interest in the trade secret, covered by the contract, it necessarily *had* to side with petitioner, whose dedicated and militant efforts have consistently been to prevent disclosure. It would have stood *with* petitioner in that common objective, not *against* petitioner! It would have sought relief against du Pont, which initiated the discovery proceedings in which the discovery orders were made. It would have sought relief against the disclosure

orders; it would not have conceded their validity and then sought the District Court's order preventing petitioner from complying with them!

In this most remarkable and unprecedented situation, respondent stands, backed by the Court of Appeals (on this appeal), on one side, du Pont stands, backed by the District Court (on said disclosure orders), on the other side, *both against petitioner,* which stands alone (except for the law) and which cannot, without this Court's help, escape the obvious critical consequences.

Since legal injustice, whatever else it may be, in any event, is the failure to apply the established, relevant law to a justiciable controversy, the result in this case, if the Court of Appeals' decision is permitted to stand, would be marked injustice to petitioner, since the federal rules involved, the orderly established procedure and the applicable decisions, as noted, all support its position on this appeal.

Petitioner again most urgently and respectfully prays that this Court grant certiorari in this case.

Dated: June 9, 1960.

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